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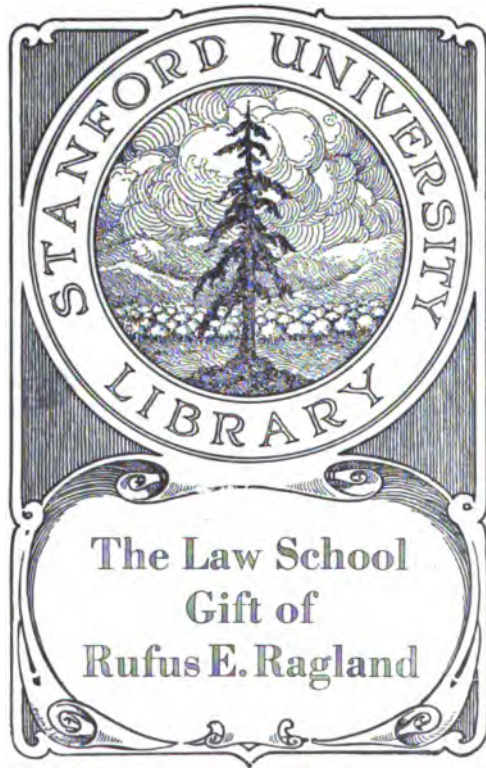
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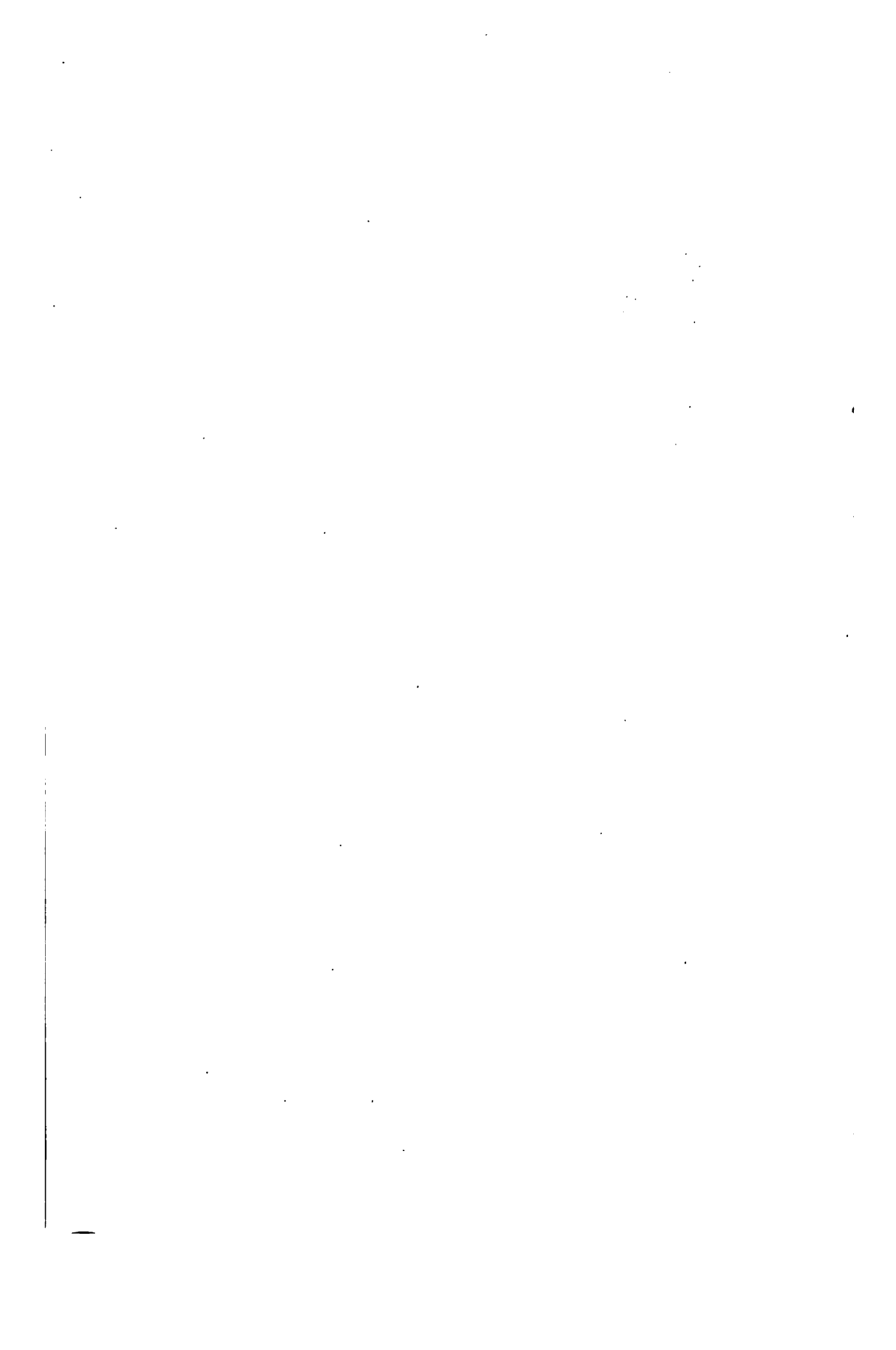


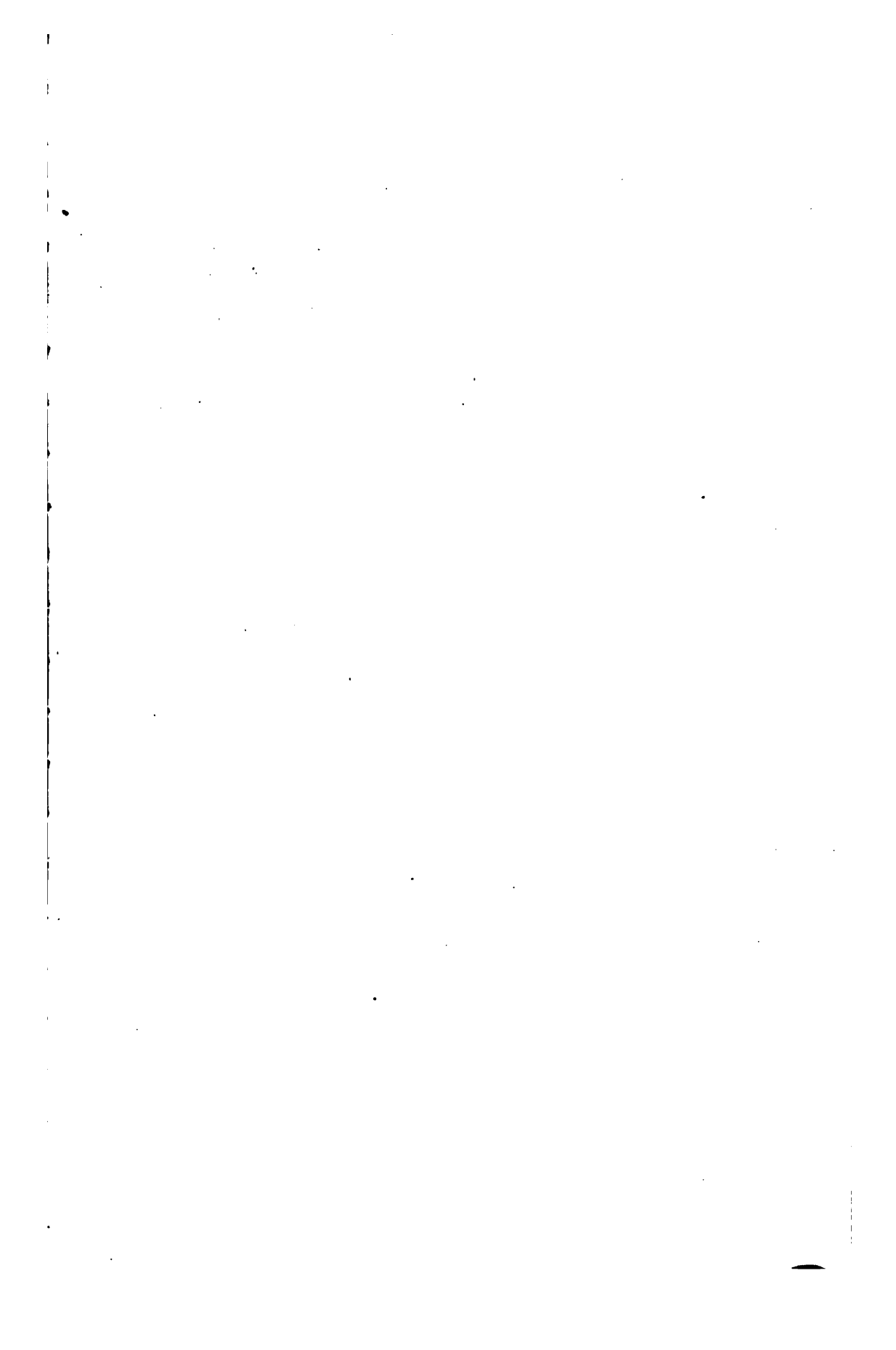
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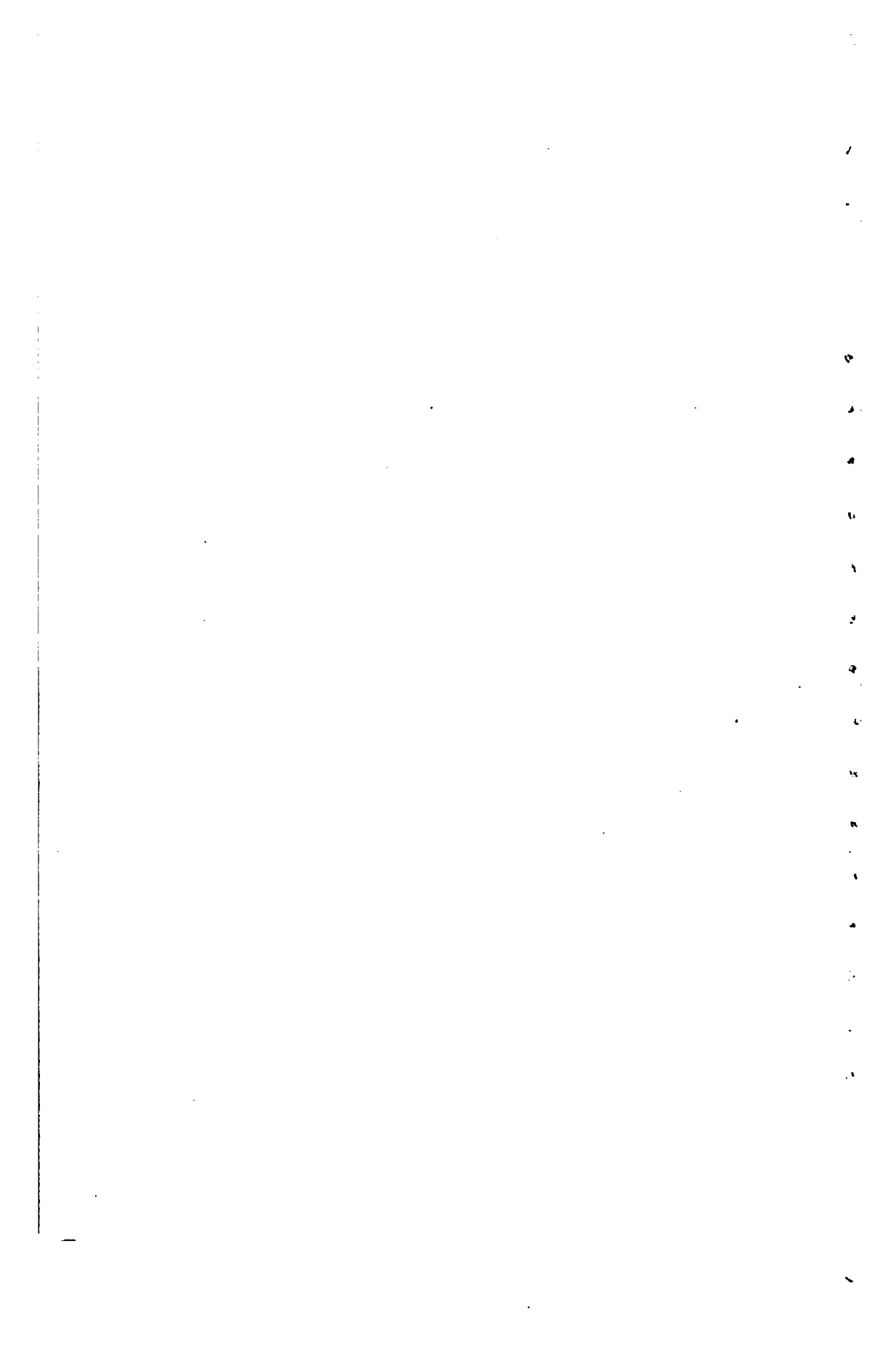
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AMERICAN
NEGLIGENCE REPORTS
CURRENT SERIES

[CITED AM. NEG. REP.]

THE CURRENT NEGLIGENCE CASES DECIDED IN THE FEDERAL
COURTS OF THE UNITED STATES, THE COURTS OF LAST
RESORT OF ALL THE STATES AND TERRITORIES AND
SELECTIONS FROM THE INTERMEDIATE COURTS

TOGETHER WITH
SPECIAL NOTES AND ANNOTATIONS

EDITED BY
WALTER J. EAGLE
EDITOR OF AMERICAN NEGLIGENCE CASES

VOL. XXI

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PREFACE.

Following the plan of the previous volumes of the series of **AMERICAN NEGLIGENCE REPORTS**, this volume (VOL. XXI, AM. NEG. REP.) contains reports of cases relating to **INJURIES TO PERSONS AND PROPERTY**, decided in the State and Federal Courts during the year 1909, together with several rendered in 1907, 1908 and 1910, being **NEGLIGENCE** cases arising out of the relations of **CARRIER AND PASSENGER**, **LANDLORD AND TENANT**, **MASTER AND SERVANT**, **MUNICIPAL CORPORATIONS**, **STEAM AND STREET RAILROAD COMPANIES**, etc., and all other branches of the **LAW OF NEGLIGENCE**.

The cases reported herein comprise decisions in the highest courts of Alabama, Arizona, Arkansas, California (Supreme and Appellate), Colorado (Supreme and Appellate), Connecticut, Delaware (Supreme and Superior), District of Columbia, Florida, Georgia (Supreme and Appeals), Idaho, Illinois (Supreme and Appellate), Indiana (Supreme and Appellate), Indian Territory, Iowa, Kansas (Supreme and Appellate), Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri (Supreme and Appellate), Montana, Nebraska, Nevada, New Hampshire, New Jersey (Supreme and Errors and Appeals), New York (Court of Appeals and Appellate Division of Supreme Court), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, • Tennessee, Texas (Supreme and Civil Appeals), Utah, Vermont, Virginia, Washington, West Virginia, Wyoming, and the United States Supreme, Circuit Courts of Appeals and Circuit and District Courts.

SPECIAL NOTES and **ANNOTATIONS** bearing on the **LAW OF NEGLIGENCE** appear in the volume, among them being **TELEGRAM CASES**; **ELEVATOR CASES**; **MINING CASES**; **CARRIER OF PASSENGERS (ALIGHTING AND BOARDING CASES)**; **CARRIER OF GOODS (LIVE STOCK AND MERCHANDISE)**; **MALPRACTICE CASES**; **ANIMAL CASES**; **ACCIDENT POLICY CASES**, etc.; **HORSES FRIGHTENED BY VARIOUS OBJECTS**; **LINEMEN INJURED BY**

ELECTRICITY; PROPERTY DAMAGED BY OVERFLOW OF WATER; INJURIES CAUSED BY "FLYING OBJECTS"; TURNTABLE CASES; ATTRACTIVE DANGERS TO CHILDREN; LIABILITY OF INN-KEEPERS FOR LOSS OF PROPERTY OF AND FOR INJURIES TO GUESTS; LIABILITY OF WATER COMPANIES FOR DAMAGES CAUSED BY FIRE; LIMITATIONS AND CONDITIONS ON PASSENGERS' TICKETS; LIABILITY OF MANUFACTURER AND DEALER FOR INJURIES TO THIRD PERSONS CAUSED BY USE OF DANGEROUS ARTICLES OR COMMODITIES, etc., all of which NOTES show numerous recent decisions on the subjects treated. The complete list of NOTES will be found at the end of the TABLE OF CASES REPORTED.

Reference to the TABLE OF CASES CLASSIFIED ACCORDING TO FACTS, which precedes the INDEX, will enable the practitioner to see at a glance the nature of the case reported herein, a ready guide to a case in point. The TABLE OF CASES CITED, which follows the Table of Cases Reported, shows numerous leading cases on NEGLIGENCE LAW cited and discussed in the cases reported in this volume.

Attention is called to the AMERICAN NEGLIGENCE DIGEST (1909 edition) which comprises all the cases contained in VOLS. I to XX, inclusive, of the series of AMERICAN NEGLIGENCE REPORTS from 1897 to 1907. This volume (21 AM. NEG. REP.) practically supplements the DIGEST of 1909.

WALTER J. EAGLE.

NEW YORK, *September*, 1910.

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AMERICAN NEGLIGENCE REPORTS.

WESTERN UNION TELEGRAPH COMPANY v. HILL.

Supreme Court, Alabama, June, 1909.

TELEGRAPH COMPANY—DEATH MESSAGE—DELAY IN DELIVERY—DAMAGES.—In an action for damages for negligent delay in delivering a telegram to plaintiff from plaintiff's wife announcing "Baby dying" and urging plaintiff to come on first train, but owing to the delay in delivery he was not able to be present with his wife and in time to prepare the body of their child for removal and interment, it was *held* that plaintiff was entitled to recover actual damages in the amount paid for the message and for mental pain and anguish suffered by him in consequence of such delay in delivery of the message (1).

TELEGRAM—DELAY IN DELIVERY—CONTRACT—DAMAGES—MENTAL ANGUISH—LAW OF PLACE.—Where plaintiff's wife sent a telegram to him from a place in Georgia to a point in Alabama where he was stopping urging him to come on first train as their baby was dying, but owing to delay in delivery of message plaintiff was unable to be with his wife in time to prepare the body of their child for removal and interment, and he suffered mental anguish in consequence thereof, and

1. **Telegram Cases.**—See Notes of recent cases relating to delay in delivery or mistakes in transmission of telegrams, following the case at bar.

For other "Telegram cases" from 1897 to 1907, see Vols. 1-20, of AM. NEG. REP., and the AMERICAN NEGLIGENCE DIGEST (1909), in which Digest the cases are duly classified under the title, "Telegrams."

As to the question of recovery of damages for mental anguish in "tele-

gram cases," see Vols. 1-20, AMERICAN NEGLIGENCE REPORTS and the AMERICAN NEGLIGENCE DIGEST (1909), and more especially see 8 AM. NEG. REP. 578-585, where there is a *Note on failure to deliver, or delay in delivery of, telegrams relating to sickness and death, and recovery of damages for mental suffering caused thereby, in which numerous cases in all the States are collated and reviewed.*

plaintiff brought an action *ex contractu* in Alabama, no breach of contract having occurred in Georgia, the wrong complained of having occurred solely in Alabama, it was *held* that plaintiff was entitled in such action to recover for mental anguish under the law of Alabama although such damages are not recoverable in Georgia.

TORTS—LAW OF PLACE.—Where a tort is committed in one State and sued on in another State, the *lex loci delicti* controls.

TELEGRAM—DELAY IN DELIVERY—ACTION.—Actions against telegraph companies for delay in delivering messages are not necessarily *ex contractu*; they may be *ex delicto* for breach of a duty; the injury, in such cases, being more often the result of a breach of duty growing out of the contract, than a mere breach of the contract.

QUOTIENT VERDICT—NEW TRIAL.—The fact that the jurors agreed among themselves to render a quotient verdict, and afterwards declined to do so, and in fact did not arrive at their verdict in that manner, did not make the verdict a quotient one, and was no reason for setting the verdict aside.

TELEGRAPH—DEFINITION.—A “telegraph” is defined as an apparatus or machine used to transmit intelligence to a distant point by means of electricity.

TELEGRAM—DEFINITION.—A “telegram” is a message or dispatch transmitted by the telegraph.

TELEGRAPH—PUBLIC USE—EMINENT DOMAIN.—A telegraph is such a public use as to justify the exercise of the right of eminent domain and to authorize the regulation of the business by proper laws.

TELEGRAPH COMPANY—DUTIES AND LIABILITIES.—A telegraph company is bound to serve the public without discrimination and cannot evade liability for the consequences of its negligence by any contract, but it is not an insurer.

—**TRANSMISSION OF MESSAGE.**—Upon the receipt of a message it is the duty of the telegraph company to transmit it without delay, and if from any cause it is impossible to transmit the message, the company should inform the sender; certainly so if the message shows on its face the importance of hasty transmission and delivery.

—**DELIVERY OF MESSAGE.**—Delivery of a message should be made as soon after transmission as is reasonably practicable, the duty of early delivery being as necessary as prompt transmission.

—**DELIVERY—QUESTION FOR JURY.**—What constitutes due diligence as to prompt delivery is usually a question for the jury, dependent upon the facts of each particular case.

—**RULES AND REGULATIONS—OFFICE HOURS.**—A telegraph company has a right to provide reasonable regulations as to hours during which it will do business, and the reasonableness of the same depends largely upon the character of business done, the locality of the office, and is often a mixed question of law and fact.

—**WAIVER OF RULES.**—A telegraph company may waive its rules as to office hours, and it cannot receive or transmit a message out of its office hours, especially when that fact is not brought home to the patron, and then set up that regulation as a defense to an action for a breach of its contract or for its negligence in failing to deliver.

APPEAL from City Court of Montgomery.

Action by W. W. Hill against the Western Union Telegraph Company. From a judgment for plaintiff for \$1,100.40, defendant appeals. The case is fully stated in the opinion. *Judgment affirmed.*

GEORGE H. FEARONS, CAMPBELL & WALKER, and RUSHTON & COLEMAN, for appellant.

S. H. DENT, JR., for appellee.

MAYFIELD, J. — This was an action by appellee against appellant to recover damages for failure to deliver within a reasonable time a telegram, and that, by reason of such failure on the part of the telegraph company, the plaintiff did not receive the message in time to reach Gainesville, in the State of Georgia, so as to be present with his wife and in time to prepare the body of their child for removal and interment, and claims as actual damages forty cents paid to the defendant company for sending the message and for mental pain and anguish suffered by the plaintiff in consequence thereof. To this complaint the defendant filed pleas, one setting up the general issue, and special plea No. 2, which was in words and figures as follows: "2. For further answer to said complaint, this defendant says: That the contract for transmission and delivery of the telegram, for the breach of which this action was brought, was not made in the State of Alabama, but was entered into between the plaintiff's agent and the defendant in the State of Georgia, and was to be partly performed in the State of Georgia; that said contract is to be construed and governed according to the laws of the State of Georgia; that under the laws of the State of Georgia, as construed by its highest court, plaintiff cannot recover the special damages for mental pain and anguish claimed in each count of the complaint." To which special plea the plaintiff demurred, and the courts sustained the demurrer. The trial was had upon the general issue, and resulted in a verdict for the plaintiff for \$1,100.40. The defendant subsequently made a motion to set aside the verdict, because it was contrary to the evidence, because the verdict was excessive, and because it was a quotient verdict. On hearing this motion, upon the affidavit made in connection therewith the court overruled the motion, and the defendant then and there duly excepted.

The facts as shown by the record are substantially as follows: The wife of plaintiff and his oldest child, three and one-half years old, and the one who died, who was about twenty-one or twenty-two months old, were at Gainesville, Ga., during the summer of 1906. That the plaintiff was there a while and left about a week before the death of the child, and instructed

his wife that if any change took place in the condition of the child, to wire or phone him at once in order that he might come back. At about 6:30 o'clock Sunday morning, on July 15, 1906, the landlady, Mrs. Bell, with whom Mrs. Hill was stopping, telephoned to the defendant company's office at Gainesville asking the agent to take over the telephone for transmission a telegram reading as follows: "Gainesville, Ga., 7-15-1906. W. W. Hill, 643 South Lawrence Street, Montgomery. Come on first train. Baby dying. (Signed) Mrs. W. W. Hill." That the operator got up, dressed, and went to the office of the telegraph company and sent the message at 6:43 a. m., Eastern time, to Atlanta, Ga. That the amount paid for the message was forty cents. That between six and seven a. m. Central time the same morning another agent of the defendant company was on duty at the defendant's office at Montgomery for the purpose of testing wires and to send out linemen, etc. That at 6:15 a. m., Central, he got a call from the chief clerk at Atlanta. That the chief clerk at Atlanta said to him, "Take this rush message." That he then took the message over the wire, wrote it out, and hung it on the file where the telegrams always hung and where the delivery clerk got them. That there was no one in the office at the time but him and no messenger boys. That the office hours of defendant in Montgomery in week days were seven o'clock in the morning and on Sundays eight o'clock. That the business was conducted at Montgomery as follows: The operators took the message over the wires, and that check boys came around and checked up the messages and carried them to the messenger clerk, and that he filed them up and sent them out by the messenger boys. That the office was not open for business on Sunday mornings until eight o'clock. That the agent in the office who received the message had only been in Montgomery about ten days and did not know plaintiff's residence. That it also appeared that there was a telephone in the office of the Western Union Telegraph office and that Mr. Hill also had a telephone at his residence. Plaintiff, Mr. Hill, got a message over the long distance telephone from Selma about eight o'clock informing him of the dangerous condition of his child, and that he left his house at about 8:20 and drove to the depot. That a messenger boy was started with this message at about 8:20. The boy not finding him at home, followed him to the depot and delivered the message at 8:50. That a through train left Montgomery at 6:55 a. m., which went through Atlanta and by Gainesville, reaching Gainesville at two o'clock. That a local train left Montgomery for Atlanta at 9:15. Mr. Hill went on this train to Atlanta, wiring his wife to come to Atlanta. He met his wife in

Atlanta with the corpse of the child. The train he went on made no connection at Atlanta. He reached Atlanta about two or three o'clock in the afternoon. That plaintiff telephoned from Atlanta to Gainesville about making arrangements for bringing the child home. That there was no relative of his wife at Gainesville at the time. That his wife reached Atlanta about six o'clock in the afternoon. That he was in Atlanta by himself from two o'clock until six o'clock. The child died about eight o'clock in the morning of the 15th of July.

Various errors are assigned: First, to the sustaining of the demurrer to defendants special plea No. 2 and the exclusion of the decision of the Supreme Court of Georgia in the case of *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 15 S. E. 901, and the exclusion of certain sections of the Georgia Code, and to other rulings as to the evidence and to the giving and refusing of certain charges, and to the refusal of the court to set aside the verdict for the reason assigned in the motion.

Probably the most serious question involved by this appeal, and the assignment insisted upon most strenuously by counsel for appellant is that under the laws of Georgia damages are not recoverable for mental anguish in cases for failure to deliver or delay in delivering telegrams like the one in question, and that, the contract the basis of this action being made in Georgia, the laws of Georgia govern to the damages recoverable for the delay or failure to deliver the telegram in question. It is insisted by counsel for appellant that the *lex loci contractus* and not the *lex fori*, governs the measure of damages in this case. The complaint contained two counts, and both are treated as counts *ex contractu*. It must be conceded that there is much conflict of authorities on the question as to what law governs the recovery in telegraph cases where a telegram is sent from one State to another; some holding that the law of the State in which the telegram originated governs, and others holding that the law of the State where it is delivered, or where the negligent act complained of or where the breach of the contract occurred, governs as to the measure of damages. It is conceded that the law of the forum will govern in matters pertaining to remedy; but it is insisted by appellant that by "remedy" here is meant such matters as pertain to the character and form of action, evidence, procedure, mode of redress, limitations, executions, etc., and that the damages to be allowed if fixed or limited by law, pertain to the right, and not to the remedy. So far as we know, this question has not been before passed upon by this court with regard to telegraph cases, though there are a number of cases which may be analogous. As this court has said: "A con-

tract is usually governed as to its nature, obligation, validity, and interpretation by the law of the place where it is made, unless it is to be wholly performed in another State, or in which the place of performance, or in which the parties agree, must govern." 2 Mayfield's Digest, p. 668, subject "Conflict of Laws."

It should be remembered that in this case as in most cases for failure to deliver or delay in delivering telegraph messages, while a contract is spoken of and the actions are often brought as for a breach of a contract, in fact, there is no express contract, or any express agreement. Whatever contract or agreement that exists is an implied one, and is usually, though not always, a breach of duty imposed by law, rather than a breach of an express contract; but it may be said that it is often as in this case, a breach of an implied contract.

A "telegraph" is defined as an apparatus or machine used to transmit intelligence to a distant point by means of electricity. A "telegram" is a message or dispatch transmitted by the telegraph. A telegraph is such a public use as to justify the exercise of the right of eminent domain and to authorize the sovereign to regulate the business by a proper law. Telegraph companies are in many respects analogous to common carriers. Like common carriers, they are bound to serve the public without discrimination and cannot evade liability for the consequences of their negligence by any contract. Unlike common carriers they are not insurers. A telegraph company is therefore an important public agency and an instrument of commerce. Consequently the duties and obligations of a telegraph company do not arise entirely out of contract, being a *quasi*-public institution. This duty and liability is not measured by the standard of private individuals. The contracts for sending and delivering messages, such as the one in question, give force and effect to these public duties which the law imposes. Some of these duties are to accept for transmission all proper messages tendered by persons who comply, or offer to comply, with the reasonable rules and regulations of the company; but the mere fact that the message offered did not comply with the rules of the company by being on its regular blanks, but is simply telephoned to the operator, does not affect its liability, where the negligence complained of is failure to deliver after transmission.

Upon receipt of the message it is the duty of the telegraph company to transmit it without delay, and if from any cause it is possible to transmit the message, or if delay will be necessary, the company should inform the sender; certainly so if the message shows on its

face the importance of hasty transmission and delivery. The message, when transmitted, must be delivered to the addressee or his authorized agent. Delivery should be made as soon after the transmission as is reasonably practicable. The duty of early delivery is as necessary as the prompt transmission. What constitutes due diligence as to prompt delivery is usually a question for the jury, and usually depends upon the facts of each particular case. Telegraph companies have a right to provide reasonable regulations as to hours during which it will do business, and the reasonableness of the regulation will depend largely upon the character of business done, the locality of the office, and is often a mixed question of law and fact; but a telegraph company may waive its rules as to office hours, and it cannot receive or transmit a message out of its office hours, especially when that fact is not brought home to the patron, and then set up that regulation as a defense to an action for a breach of its contract or for its negligence in failing to deliver. These rules, like any other rules of other companies, are designed for the benefit and protection of the company itself, and may be waived expressly or by implication. *Wilson's Case*, 93 Ala. 32, 9 So. Rep. 414.

The rule as to the measure of damages against the telegraph companies for failure to deliver or to deliver promptly, or for negligence in the transmission and delivery, unfortunately is not well settled, and the decisions of the various courts of the United States are far from being uniform, and many decisions of the same court of many States are conflicting. Actions against telegraph companies, like the one in question, are not necessarily *ex contractu*. They may be *ex delicto* for the breach of a duty; the right of action somewhat depending upon the implied contract of sending as to make the general rule relating to damages for breach of a contract applicable. Injury, in such cases, is more often the result of a breach of duty imposed by law or a breach of duty growing out of the contract, than a mere breach of the contract. The contract usually serves merely to show the relation of the parties and the existence of a duty breached, which duty is more often imposed by law than by contract. There is rarely any express contract between the parties. Whatever exists is usually implied. Of course, parties can make contracts with regard to sending and delivery; but we are speaking now of the usual contracts.

Likewise, the authorities are far from uniform as to whether or not damages for mental anguish are recoverable in actions for failure or delay in delivering or transmitting telegrams; some courts holding that they are recoverable in certain actions and not in others,

some courts holding that they are recoverable under certain conditions and not under others, and some holding that they are not recoverable in any action or under any condition. These various rulings and conflicting decisions involve various perplexing questions, as to all of which very few agree. One is: Whether the sendee as well as the sender can recover; whether the action is in contract or in tort; whether the mere violation of a contract as to injured feelings, and mental anguish disconnected and disassociated from physical injury or injury to estate, is an element of damages; to what extent the message must show on its face the relationship of the parties; and whether damages for mental anguish are in their nature punitive or compensatory. However, the rule has been settled in this State, and probably cannot be better or more succinctly expressed, than was done by Chief Justice McClellan in the case of *Blount v. Western Union Tel. Co.*, 126 Ala. 107, 27 So. Rep. 779, 8 Am. Neg. Rep. 32, as follows: "The complaint in this case claims damages only for mental suffering. Such damages are not recoverable in actions for the nondelivery or negligent delivery of telegrams, except in cases where there is a right of recovery aside from such injuries. There can be no recovery of actual substantive damages for physical injuries or injuries in estate here, for no such damages are claimed. There can be no recovery here of nominal damages as for a breach of contract — to which we have held that damages for mental suffering may be superadded — because the complaint is not upon contract, but purely in tort. No recovery, apart from damages for mental suffering, in other words, can be had on this complaint, and therefore no recovery for mental suffering can be had." Or by Chief Justice Tyson, in *Westmoreland's Case*, 151 Ala. 319, 44 So. Rep. 383, to this effect: "Such damages, notwithstanding their elusive character, are actual; but they are ordinarily not the natural result of a breach, and thus not within the contemplation of the parties. In cases where they are not clearly contemplated, it would be dangerous and unfair in the extreme to allow them. When the message is between persons of a close degree of relationship and relates to exceptional events, such as sickness or death of such relations, in which a failure to deliver obviously comprehends mental distress and anguish, we have allowed such anguish as an item of damages; but to extend as a natural result the allowance on other occasions would in our judgment tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its result." *Crocker's Case*, 135 Ala. 492, 14 Am. Neg. Rep. 44, 33 So. Rep. 45;

Ayers' Case, 131 Ala. 391, 31 So. Rep. 78; Water's Case, 139 Ala. 653, 3 So. Rep. 773; Crumpton's Case, 138 Ala. 632, 36 So. Rep. 517; Henderson's Case, 89 Ala. 510, 7 So. Rep. 419; Krichbaum's Case, 132 Ala. 535, 14 Am. Neg. Rep. 44, 31 So. Rep. 607; Cunningham's Case, 99 Ala. 314, 14 So. Rep. 579; Wilson's Case, 93 Ala. 32, 9 So. Rep. 414; McNair's Case, 120 Ala. 99, 23 So. Rep. 810. As was said by Chief Justice Tyson in Westmoreland's Case above: "It is often a question difficult to determine, whether an action from its mere nature or in its form is in case or assumption. * * * Manifestly the measure of damages in such cases cannot be altered in any material respect by a mere adoption of one form of action rather than another for the redress of the same grievance."

As to the main questions involved in this appeal, as to whether the laws of Georgia or of Alabama should control in determining whether or not damages for mental anguish were recoverable in this action, we are met again with the condition that there is more conflict in the decisions, if possible, than of the law of the two States, as to which of the two laws, if different, should control. The question has been treated fully in a note to the case of *Gray v. Telegraph Co.*, as reported in 91 Am. St. Rep. 706, in which the annotator concedes the conflict, but probably is constrained to the view that the *lex loci contractus* controls in such cases. The question has also been reviewed by annotators in the *Lawyers' Reports Annotated*. See note to case of *Hughes v. Penn. Co.*, 63 L. R. A. 532. This annotator also concedes the conflict and reviews many of the conflicting decisions. There are various other conflicting decisions than those reviewed by the annotators. The writer of the text in the *American and English Encyclopedia of Law* (2d Ed.) Vol. 27, p. 1907, states the law applicable to this case as follows: "The fact that damages for mental anguish alone are not recoverable under the laws of the State from which the message was sent will not preclude a recovery of such damages in the State to which the message was directed, where the laws of the latter State permit such recovery. Likewise, a recovery for such damages may be had in the State whence the message was sent, although they may not be recoverable under the laws of the State where the message was to be delivered. But when the law of the place whence the message was sent and that of the place of delivery both refuse to recognize such damages, they cannot be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them."

After a careful examination of all these authorities, we deem the sounder rule to be, in cases like the one at bar, though we do not decide that the same rule would apply in all cases, that the laws of Alabama should govern in this case, for the reason that the complaint, as well as the undisputed evidence, shows that whether the injury was the result of a breach of a contract, or whether it was the result of a breach of a duty growing out of a contract or imposed by law, it occurred solely within the State of Alabama, and that the parties to the contract and the contract itself, if any existed, provided for or allowed the contract to be performed partly at least in Alabama. No breach of the contract occurred in the State of Georgia either as alleged in the complaint or as shown by the evidence. No negligent act was alleged to have occurred in that State or was shown by the evidence to have occurred there. The wrong complained of, and if shown to exist by the evidence, occurred in Alabama. The plaintiff resided in Alabama. He had a right to bring his action in the courts of Alabama either for a breach of the contract or for a breach of duty imposed by law and the contract together. If the action had been in tort, rather than in contract, then we think it certain that the laws of Alabama would control, and we can see no reason, though there is authority to the contrary, that the laws of Georgia should control. The general rule seems to be that, where the right of action is independent of a contract, the *locus* of the contract is immaterial and cannot affect the question of measure of damages recoverable. We also think that the great weight of authority supports the proposition that, where a tort is committed in one State and sued on in another, the *lex loci delicti* controls. So if the action at bar could be construed as one of tort, disconnected from the contract, then if the action were brought in Georgia, the laws of Alabama would control.

Chief Justice Stone, in Falls' Case, 97 Ala. 433, 13 So. Rep. 31, quoting from Chancellor Kent, says that: "If the contract be made under one government and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is that the contract in respect to its construction and force is to be governed by the laws of the country or State in which it is to be executed. And in quoting from Mr. Story, he says: "Where the contract is either expressly or tacitly to be performed in another place, then the general rule is in conformity to the presumed intention of the parties that the contract as to its nature, validity, obligation, and interpretation is to be governed by the law of the place of performance." He also

quotes from the Am. & Eng. Encyc. of Law, as follows: "As a general rule, the validity of the contract is to be determined by the law of the place where it is made, unless it appears on its face that it was to be performed or made in reference to the laws of some other place, in which case it will be governed by the laws of the place of performance." This language was quoted by the learned Chief Justice, which evidently met his sanction, though it was made in a dissenting opinion, in which he held that the contract in question was governed by the laws of Minnesota, rather than of Alabama; the majority of the court holding that it was governed by the laws of Alabama.

It is true, as said by the same learned Chief Justice in the same case, that, in entering into contracts, if nothing appear to the contrary, the law of the place silently becomes a part of the contract and determines the measure of the rights it secures, but adds: "This right of comity, however, has limitations. No State will enforce contracts or redress grievances entered into or suffered in another State, if the enforcement involve a breach of legal or moral right as maintained in the law of the forum." It is likewise a fundamental principle that the laws of the State can have no binding force *proprio vigore* outside of the territorial limits and jurisdiction of the State enacting them. Consequently any provision found in the law of another State authorizing the making of a contract which is obnoxious to the laws of Alabama, as to such obnoxious provisions the contract will not be enforced in Alabama; but it will be enforced in Alabama only to the extent that it is lawful in Alabama. While there are respectable authorities holding that, where a contract is entered into in one State to be performed partly in that State and partly in another, the laws of the State in which the contract was made will control as to the measure of damages, but in a case like this, where the contract of necessity, so far as the breach complained of was concerned, must be performed wholly within the State of Alabama, then this rule would not apply; that is to say, the breach complained of was delay in delivering a telegram. The parties intended that the telegram should be delivered in Alabama, and it was not contemplated that it could or would be delivered in Georgia. While a part of the transmitting would probably be performed in Georgia, that part for the breach of which this action is brought was to be performed wholly within the State of Alabama, and as the breach occurred here, and a part of the injury at least was suffered here, we think the laws of Alabama and not the laws of Georgia, should control as to the measure of damages. If the breach

had occurred in Georgia, rather than in Alabama, then the same reason, the laws of Georgia should control, rather than that of Alabama.

There is another strong reason, if not a conclusive one, why the laws of Alabama should govern in this case. It will be observed that the laws of Georgia did not deny that the plaintiff in a case like this suffers damages for mental anguish; but the court merely declares that they are of such nature that they are not recoverable in courts and under the laws of Georgia. We do not think that the courts of Alabama are bound in this respect by the courts of Georgia; but as to whether or not such damages, if suffered, are recoverable in an action like this when brought in the courts of Alabama, is properly decided by the court of Alabama untrammelled by the decisions of any other court. This is the rule that seems to be adopted by the Federal court with regard to the recovery of damages for mental anguish, no matter what may be the laws of the State in which the contract was made, or in which the breach occurred, or in which the action is brought. The Federal court holds to the rule that such damages are not recoverable in the Federal court, and that the question is one with respect to which such court will exercise an independent judgment and will not be bound by the holding of the courts of the States in which the cases arise. *Skier's Case*, 126 Fed. 295, 61 C. C. A. 281; *Wood's Case*, 57 Fed. 471, 6 C. C. A. 432.

It therefore follows that there was no error in the court sustaining demurrer to plea No. 2, nor in excluding the evidence offered by the defendant as to the laws of Georgia. The demurrer to the plea could have been properly sustained for the reason that it was intended as a plea in bar and only went to the measure of damages, not denying the right to recovery as to nominal damages. Such questions should be raised by objections to the evidence, motions to strike, or instructions by the court.

We likewise see no error in the court allowing plaintiff to prove that he had a telephone in his house, and that there was one in the defendant company's office at Montgomery, and that he had frequently received messages from the defendant company over the telephone.

We find no error in the refusal to give any of the charges requested by the defendant. There was certainly evidence tending to support all the material averments of the complaint, and consequently the general affirmative charge for the defendant could not have been given as to any one of the counts. What we have said

as to the right to recover damages for mental suffering disposes of the charge which sought to limit the recovery to other damages than for mental suffering. Nor do we think there was any error in that part of the oral charge excepted to by the defendant to the effect that, notwithstanding the defendant company may have adopted office hours, if it undertook to transmit and deliver a telegram, the jury had a right to look to that circumstance, the nature of the telegram, and everything else in the case, in saying whether or not the defendant was negligent in failing to deliver the telegram sooner than it did deliver it. As stated in the opinion above, a telegraph company has a right to adopt rules as to office hours and have reasonable rules for its own protection; but it also has a right to waive them, and does waive them as to office hours when it accepts a message for transmission and delivery without the office hours without informing the sender of such rules or without explaining to him that it would not be transmitted or delivered until the time. Of course, if the telegraph agent so receiving had no knowledge of the office hours at other offices, and was not chargeable with notice or knowledge thereof, so receiving the message would not be a waiver. However, we hold that in this case there was sufficient evidence to authorize the submission to the jury of the question of waiver of the rules, and to prevent the giving of the general affirmative charge to the jury on this question.

There was likewise no error in the court's overruling defendant's motion for a new trial. The evidence affirmatively showed that it was not void because it was a quotient verdict. The fact that the jurors agreed among themselves to render a quotient verdict, and afterwards declined to do so, and in fact did not arrive at their verdict in that manner, does not make the verdict a quotient one, and is no reason for setting the verdict aside. Whether or not the verdict was excessive no one can tell. There is no standard or rule of computation by which the amount can be determined in this or similar cases. There may be cases where it would be so great that the court might say that it was arbitrary or intended as punishment, when no such punitive damages could be allowed, and in such case, it might be set aside; but this is not such a case.

Finding no error in the record, the cast must be affirmed.

DOWDELL, C. J., and SIMPSON and DENSON, JJ., concur in the conclusion reached in this case without committing themselves to all that is said in the opinion.

Rehearing denied, June 30, 1909.

NOTES OF RECENT CASES RELATING TO DELAY IN DELIVERY OR MISTAKES IN TRANSMISSION OF TELEGRAMS.

In connection with the preceding case of *WESTERN UNION TELEGRAPH Co. v. HILL*, (*Alabama*) 21 AM. NEG. REP. 1, 50 So. Rep. 248, see the following recent "telegram cases," the majority of which relate to "sick and death messages":

Alabama.

LELAND v. WESTERN UNION TEL. Co., (*Alabama*, April, 1909) 49 So. Rep. 252; action for failure to promptly transmit a "sick message;" gravamen of claim was for mental suffering; court charged jury that plaintiff was entitled to recover only cost of telegram with interest, and jury returned verdict accordingly for seventy-five cents and costs; plaintiff appealed, but the Supreme Court sustained the court below.

WESTERN UNION TELEGRAPH Co. v. EMERSON, (*Alabama*, May, 1909) 49 So. Rep. 820; action for negligent delay in transmission and delivery of a "death message;" judgment for plaintiff reversed; held that "a recovery cannot be had for negligent delay in the transmission of a message, where it is shown that the addressee would not have received the message in time to have avoided the injury claimed to have resulted from the delay, if it had been promptly transmitted." *Held, also*, that "the failure of a telegraph company to establish and maintain a free delivery of messages at a station having from 50 to 100 people only cannot be said to be unreasonable."

In *WESTERN UNION TELEGRAPH Co. v. BENSON*, (*Alabama*, December, 1908) 48 So. 712, an action for damages for delay in delivering a "death message," it was held that damages are recoverable for mental pain and anguish for failure of telegraph company to deliver a message sent by one brother to another announcing death of a third brother (citing several *Alabama* cases), but judgment for plaintiff was *reversed* for errors in giving and refusing certain instructions. Opinion by DENSON, J. *Rehearing denied*, February, 1909.

In *WESTERN UNION TELEGRAPH Co. v. JACKSON*, (*Alabama*, June, 1909) 50 So. Rep. 316, action for damages for delay in delivery of a "death message," judgment for plaintiff was *reversed*. Among the points decided were that "where no recoverable damages for injury to plaintiff's person, reputation or estate are alleged, damages for mental suffering are not recoverable;" that "an action in tort may be maintained by the addressee of a telegram * * * without any averment of contractual relations between plaintiff and the company;" that in such a case "it was not necessary that the complaint should also charge that the message was sent for plaintiff's benefit," (citing *Anniston Cordage Co. v. W. U. Tel. Co.*, (*Ala.*) 49 So. Rep. 770); that "where a telegram was not filed for transmission until after the close of defendant's office hours, defendant was not bound to transmit it that night, and plaintiff could not recover damages for being prevented from attending his father's funeral because of the delay," (citing *Western Union Tel. Co. v. Hill*, (*Ala.*) 50 So. Rep. 248, also reported in 21 AM. NEG. REP. 1). Opinion by DENSON, J.

IN ANNISTON CORDAGE CO. *v.* WESTERN UNION TEL. CO., (*Alabama*, May, 1909) 49 So. Rep. 770, action to recover damages for negligent mistake in transmitting a message, judgment for defendant was *affirmed*, the syllabus to 49 So. Rep., stating the points as follows:

"The addressee of a telegram erroneously transmitted may sue in tort for damages resulting therefrom, provided the message was sent for the addressee's benefit, and such fact was known to the telegraph company when it received the message for transmission

"Where defendant telegraph company received for transmission to plaintiff a telegram in the following words: 'Offer thirty thousand three and four ply eighths sixteen half. Quick reply,'—the message of itself did not charge the telegraph company with knowledge that plaintiff was the party for whose benefit the message was sent." Opinion by DENSON, J. WILLETT & WILLETT appeared for appellant (plaintiff below); KNOX, ACKER & BLACKMON, for appellee.

Arkansas.

IN WESTERN UNION TELEGRAPH CO. *v.* RHINE, (*Arkansas*, March, 1909) 117 S. W. 1069, action for damages for failure to deliver a "death message," whereby a mother was prevented from attending her son's burial, judgment for plaintiff was affirmed on condition that plaintiff remit from verdict of \$750 all over \$400, for which latter amount judgment would be affirmed, otherwise it would be reversed.

IN WESTERN UNION TELEGRAPH CO. *v.* LONG ET AL., (*Arkansas*, April, 1909) 118 S. W. 405, action by plaintiff and her father for negligent delivery of a "death message" sent by plaintiff to her father, whereby burial was prevented at a certain place, judgment in favor of plaintiff for \$300 was *reversed*, the court (per BATTLE, J.) saying: "The burden was upon the plaintiff to show a cause of action. There was no evidence to show that she was prevented from burying her husband at Caulksville. She had the means to do so. But she says that she did not wish to bury him there without the consent of her father. There was no evidence that she had any reason to believe that he would not consent. So there was no reasonable excuse for the failure to bury at Caulksville, and no cause of action against the telegraph company on account of mental anguish. Her own acts were the proximate cause of her mental anguish."

IN WESTERN UNION TELEGRAPH COMPANY *v.* GILLIS, (*Arkansas*, March, 1909) 117 S. W. 749, an action for negligent delay in delivering a "sick message," judgment for plaintiff was *reversed* for error of court in declaring as a matter of law the duty of the company to deliver messages after a certain hour where there was a conflict of testimony as to the rules relating to such question.

IN WESTERN UNION TELEGRAPH CO. *v.* OASTLER, (*Arkansas*, May, 1909) 119 S. W. 285, an action for damages for negligent transmission of a message, the case is stated in the syllabus to 119 S. W. as follows:

"A telegram sent to plaintiff from her husband, who had gone to another State for a short time, 'Will be home on Cannon Ball Sunday,' did not put the company upon notice that a failure to deliver it promptly would cause mental anguish."

"The negligent transmission of a telegram from a husband to his wife, reading that he would be home 'to-day' instead of 'Sunday,' causing plaintiff to imagine that he was ill, as she testified, when he did not arrive that day, without any information justifying her conclusion, was not ground for damages for mental anguish."

Plaintiff recovered a verdict for \$100, but on defendant's appeal, this judgment was reversed and judgment was rendered for \$1.30, a part of the amount sued for. The court (per BATTLE, J.), said the case was more like *WESTERN UNION TEL. CO. v. SHENEP*, 83 Ark. 476, 104 S. W. 154, in which the "alleged mental anguish for which the court held there could be no recovery, was over an imaginary situation or worry concerning the possibility of the loss of employment—an emergency which really did not arise."

Iowa.

In *WELLS v. WESTERN UNION TEL. CO. ET AL.*, (Iowa, November, 1909) 123 N. W. 371, an action for damages sustained by plaintiff by reason of the negligence of defendant in sending a forged and fictitious telegram which, it was alleged, defendant's operator knew or should have known, was false, fictitious and forged, and that the sender had no authority to send it, judgment for plaintiff in the District Court, Webster County, was *affirmed*. In connection with this case, see also 129 Fed. 344, 64 C. C. A. 96, and subsequent appeal in 141 Fed. 538, 72 C. C. A. 596, as to other parties involved in the transaction.

Kansas.

In *WESTERN UNION TELEGRAPH CO. v. BODKIN*, (Kansas Supreme Court, April, 1909) 101 Pac. Rep. 652, an action for failure to transmit a "death message," the case is stated in the syllabus by the court as follows:

"The plaintiff alleged that he delivered a message to the defendant's operator for transmission, and paid the charges therefor, to inform his father of the shipment of the remains of a deceased brother. The message was not transmitted, and the only explanation offered by the company was the testimony of the operators that they did not receive it. The jury, having found that the message was in fact delivered and the toll paid as alleged, could, in their discretion, allow reasonable exemplary damages for the amount of the charges paid, no other actual loss being shown.

"Upon consideration of the findings, and all the circumstances proven, the award of exemplary damages is held to be excessive, and the plaintiff is allowed to remit one-half thereof; upon his failure to do so, a new trial is ordered."

Verdict for fifty-eight cents, amount of the toll, as actual damages, and \$599.42, exemplary damages, was rendered for plaintiff in the District Court, Labette County, but on appeal, as shown by the foregoing syllabus, a remittitur of \$300 was allowed, otherwise new trial ordered.

Kentucky.

In *WILLIAMS v. WESTERN UNION TEL. CO.*, (Kentucky, June, 1909) 119 S. W. 1186, an action for damages for failure to deliver a "death message,"

judgment for the defendant was *affirmed* it being held that a "telegraph company is not liable for not sending a telegram which was not delivered because of failure to find the addressee sooner than it did, where there is nothing to show that had the telegram been sent sooner the addressee could have been found."

In *CURD v. CUMBERLAND TELEPHONE & TELEGRAPH Co.*, (*Kentucky*, June 1909) 119 S. W. 746, the syllabus states the case as follows:

"Plaintiff's sister died at her house, and, not having money to buy a coffin or to transport the body to the child's home, she telephoned her father and he contracted with defendant telephone company to transmit the money by telephone, which was done; but the money was delayed in delivery, and it was too late to get a coffin on the day it was delivered, so as to ship the corpse on that day—it being shipped the next day. *Held*, that the contract to deliver the money was made by plaintiff's father for his own benefit, plaintiff being merely his agent for preparing the body for burial, so that she could not recover damages for mental anguish suffered because the child remained in the house for a longer time on account of the delay." Judgment dismissing plaintiff's petition was *affirmed*.

Mississippi.

In *WESTERN UNION TELEGRAPH Co. v. JACKSON*, (*Mississippi*, June, 1909) 49 So. Rep. 737, action for punitive damages for failure to deliver a "death message," judgment for plaintiff for \$250 was *reversed* for error in admitting in evidence certain statements made by defendant's messenger boy several days after delivery of telegram, the same not being part of the *res gesta*, and for error in submitting question of punitive damages to jury where there was no such element disclosed by the evidence.

In *WESTERN UNION TELEGRAPH Co. v. ADAMS MACHINE Co.*, (*Mississippi*, 1908) 47 So. Rep. 412, an appeal from judgment for plaintiff in the Circuit Court, Alcorn County, in an action for failure to deliver a telegram, in which *HARRIS & WILLING* appeared for appellant, and *CHANDLER & CHANDLER*, for appellee, judgment was *reversed*, the following opinion being rendered by *CALHOON J.*: "The declaration of appellee avers that it lost \$450, which would have been profits, if it had manufactured certain machinery; that its salesman, Mr. Barnes, contracted with a firm in Marthasville, La., to sell them the machinery "provided the plaintiff would guarantee shipment of said machinery from Corinth, Miss., to Marthasville, within 30 days." Accordingly, the declaration avers, the agent delivered for transmission at the office of appellant in Marthasville a telegram in the following words:

"Will you guarantee shipment 50 H. P. boiler, 40 H. P. engine No. 4 mill 78 S. G. Edger in 30 days"—properly signed. This telegram was never delivered, and, as before said, the claim is specifically for \$450, the profit which would have been made if the telegram had been received and the contract closed.

"It is plain that there was no completed contract, and it is plain, also, that the evidence to the effect that the machine company would have accepted the proposition was not competent as evidence. It is also plain in this case that the machine company had only lost an opportunity of making a proposed contract. Profits cannot be recovered, according to the uniform trend of the

authorities, unless they are such as grew out of a contract perfected. The cases of *Alexander v. W. U. Tel. Co.*, 66 Miss. 161, 5 So. Rep. 397, and *Id.*, 67 Miss. 386, 7 So. Rep. 280, are not this case, because there Alexander had an offer to sell him land at a specific amount, and asking Mr. Alexander, if he wanted the land at that price, to inform him at the day fixed of his acceptance. Mr. Alexander answered: 'Get option until Monday if you can, if not, close trade and fix papers.' So we have in that case no obligation which would have bound Mr. Alexander if the trade had been closed according to instructions. The trade was not so closed because of the non-delivery of the telegram, and the specific damages were proved to be the difference in values of the property. The court held that the damages claimed did not fall within the general line of decisions as being too speculative, but were actual damages resulting 'directly and naturally from the breach of duty and contract upon which the complaint is founded,' and that they might be established 'with as near absolute certainty as any class of damages.'

"We are unable to distinguish the case in hand from the case of *Johnson v. W. U. Tel. Co.*, 79 Miss. 58, 12 Am. Neg. Rep. 487, 29 So. Rep. 787, in which case the telegram was: 'We have a million yards, pay both ways; work Georgiana, Alabama. Do you want any? Hancock will be in Georgiana after Thursday. Speak quick.' The telegram was never delivered, and the declaration averred that Johnson wanted work, and would have gone to Georgiana and made money, which he lost because of the nondelivery; and this court in that case said: 'We think the damages here are too remote to be recovered. If the telegram had been received, it only gave the appellant an opportunity of making a contract for railroad work, which he might or might not have made.' This decision is exactly in line with all the well-considered authorities which we have been referred to. We now cite: *W. U. Tel. Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577; *Richmond v. W. U. Tel. Co.* 123 Ga. 216, 51 S. E. 290; *Walser v. W. U. Tel. Co.*, 114 N. C. 440, 19 S. E. 366, and cases it cites; *Clay v. W. U. Tel. Co.*, 81 Ga. 285, 6 S. E. 813; *Smith v. W. U. Tel. Co.*, 83 Ky. 104; *Kenyon v. W. U. Tel. Co.*, 100 Cal. 454, 35 Pac. 75; 27 Ency. 1061."

In *WESTERN UNION TELEGRAPH CO. v. WEBB & SMITH*, (*Mississippi*, February, 1909) 48 So. Rep. 408, an action for damages for an error in transmission of a telegraph message from a prospective contractor to plaintiff as to time in which a building could be completed by the former, which error caused plaintiff to award the contract to another firm at a higher bid, it was held that defendant company was not liable, as there being no complete contract plaintiff had only lost an opportunity to make an advantageous contract.

Following *WESTERN UNION TEL. CO. v. ADAMS MACHINE CO.*, (*Mississippi*, 1908) 47 So. Rep. 412 (see preceding case).

North Carolina.

In *HAUSER v. WESTERN UNION TEL. CO.*, (*North Carolina*, May, 1909) 64 S. E. Rep. 503, action for damages for delay in delivering a "death message," judgment for plaintiff was reversed for erroneous instruction as to burden of proof of negligence, the burden being always upon the plaintiff to prove every requisite of his cause of action.

IN *PIERSON v. WESTERN UNION TEL. CO.*, (*North Carolina*, May, 1909) 64 S. E. 577, an action for damages for failure to promptly deliver a "death message," judgment for plaintiff for \$300 was *affirmed*, the character of the message putting defendant upon notice of its importance to the sendee, and that it was sent for his benefit.

IN *SYKES v. WESTERN UNION TEL. CO.*, (*North Carolina*, April, 1909) 64 S. E. 177, an action for damages for failure to deliver a "death message," judgment for defendant was *affirmed*, the action being commenced more than sixty days after plaintiff had acquired knowledge of nondelivery of message, the contract stipulating that claim should be presented within sixty days after filing of message, or be barred of recovery. The stipulation was declared valid, on the authority of *Sherrill v. W. U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

Oklahoma.

IN *WESTERN UNION TELEGRAPH CO. v. BLACKWELL MILLING & ELEVATOR CO.*, (*Oklahoma*, July, 1909) 103 Pac. 717, the case is stated in the syllabus by the court as follows:

"In order to charge a telegraph company with liability for damages growing out of its neglect to correctly transmit a dispatch ordering the purchase or sale of a certain commodity, it is not necessary that the message should, on its face, disclose the nature of the business, so that the operator may understand its meaning as to the article, quantity, quality, and price. If enough appears in the message to show that it relates to a commercial business transaction between the correspondents, it will be sufficient to charge the company with damages resulting from its negligent transmission.

"A postal card containing the following offer was received by plaintiff: 'Gainesville, Tex., June 29, 1903. We bid you track A. T. & S. F. Ry., Blackwell, acceptance to reach us here by 9:30 a. m. next business day, shipment within 20 days, 2 Red Wheat, 63¾. Wire acceptance to Gainesville. State price when telegraphing acceptance. We reserve the right to reject amounts in excess of 10,000 bushels. Richardson & Co.' Plaintiff, in ample time for delivery in due course within its terms, answered by cipher message, which, translated, read as follows: 'We accept your bid 63¾ cents, 20,000 bushels wheat, shipment within 20 days. Give shipping instructions.' The address of the sendee of the message was plainly written; but the same was by the telegraph company negligently missent, and by reason thereof arrived too late. On this account no sale was made, and plaintiff sustained loss. There was testimony establishing that, if the message had been delivered, the amount of wheat offered would have been purchased. *Held*, the telegraph company was liable for the loss sustained." Judgment of the District Court, Kay County, in favor of plaintiff for \$400 was *affirmed*. Opinion by DUNN, J. See former appeal, 17 Okla. 376, 89 Pac. 235.

South Carolina.

IN *STRAUSS v. POSTAL TELEGRAPH-CABLE CO.*, (*South Carolina*, June, 1909) 64 S. E. Rep. 913, action for damages for failure to deliver a "sick message," it was *held* that "the mere fact that the words '726 Pine Street' were omitted from the address of the sendee in a telegram from some unaccount-

able reason, which resulted in delay in delivery, did not show intentional wrong or reckless disregard of the sender's rights warranting punitive damages," and judgment for plaintiff for \$200.53, was *reversed*.

In *FASS v. WESTERN UNION TEL. CO.*, (*South Carolina*, April, 1909) 64 S. E. 235, an action for damages in failing to deliver a telegram in response to a "sick message" whereby plaintiff's wife was made seriously ill, judgment for plaintiff was *reversed*, for erroneous admission of evidence that defendant had notice of the condition of the plaintiff's wife at the time of handing in the telegram, where there was no allegation of such notice in the complaint.

In *MIMS v. WESTERN UNION TEL. CO.*, (*South Carolina*, April, 1909) 64 S. E. 236, appeal from judgment in favor of plaintiff for mental anguish arising from failure to deliver a "death message," judgment for plaintiff in the Common Pleas Circuit Court of Greenville County was *affirmed*.

In *TOALE v. WESTERN UNION TEL. CO.*, (*South Carolina*, June, 1909) 64 S. E. 963, action for failure to deliver a telegram, the case is stated in the syllabus in 64 S. E., as follows:

"A telegram, which was delivered for transmission, recited that the company transmitted and delivered messages only on conditions limiting its liability, which have been assented to by the sender of the following message, and that it would not be liable for delays in transmission, or delivery, where claim was not presented in writing within 60 days. Held that the words quoted are as effectual to bind the sender to such condition as if it had contained the words 'which are now assented to by' the sender, 'one of the parties to the contract.'" Judgment for plaintiff *reversed*. See former opinion in 76 S. C. 248, 57 S. E. 117.

In *CLIO GIN CO. v. WESTERN UNION TEL. CO.*, (*South Carolina*, April, 1909) 64 S. E. 426, appeal by plaintiff from an order of nonsuit in action to recover damages for negligent delay in delivering a telegram relating to a contract, judgment was *affirmed*, it not being shown that defendant had knowledge of certain provisions of an alleged contract between sender and sendee.

Texas.

In *WESTERN UNION TELEGRAPH CO. v. BARRETT*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1089, action for damages for alleged delay in delivery of a "sick message," judgment for plaintiff for \$500 was *reversed* on the following point as stated in paragraph 2 of the syllabus to 118 S. W.

"Where plaintiff, by reason of a delay in a telegram announcing the illness of his daughter, was unable to take a train until six hours after he otherwise would, had the telegram been delivered in time, during which time he suffered mental anguish, he cannot recover for the failure of the telegraph company to return an answer to a message sent by him within that time, asking how the daughter was, where the answer as sent would have been that the daughter was no better." Rehearing denied, May 15, 1909.

In *WESTERN UNION TEL. CO. v. HUGHEY*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1130, action for damages for failing to deliver telegram to plaintiff informing him of serious illness of his wife, judgment for plaintiff for \$1,400 was *affirmed*. Rehearing denied, May 13, 1909.

In *WESTERN UNION TELEGRAPH CO. v. LANNOM*, (*Texas Civil Appeals*,

May, 1909) 119 S. W. 910, appeal from a judgment for plaintiff, it appeared that on "January 31, 1909, appellee's wife's father was at his home near Clinton, Ky., and was dangerously ill. Appellee's wife was at Detroit, Tex. At about 1 o'clock on the afternoon of the day mentioned one Lamkin delivered to appellant at Clinton for transmission and delivery to appellee's wife at Detroit a telegram as follows: 'Your father is very sick. Can't live but a few days. Answer.' The telegram was delivered to Mrs. Lannom on the morning of February 1, 1908. She took passage on a train due to leave Detroit for Clinton at 3:42 on the afternoon of said February 1st, and reached her father's home at about 5 o'clock on the afternoon of the next day. Her father died at about 2 o'clock on the afternoon of the day she reached Clinton. Had the telegram been promptly transmitted and delivered to her, she could and would have taken passage on a train due to leave Detroit for Clinton at 11:42 on the morning of February 1st, and would have reached her father's bedside before his death. On the ground that the delay of appellant in transmitting and delivering the telegram was negligent, appellee recovered as the damages suffered by his wife a judgment against appellant for the sum of \$1,000." Judgment for plaintiff was *affirmed*. The point decided is stated in the syllabus in 119 S. W. Rep., as follows:

"In absence of a showing either way, it will be presumed that the law of a sister State on the subject is the same as Sayles' Ann. Civ. St. 1897, art. 3379, as amended by Act April 18, 1907 (Gen. Laws 1907, p. 241, c. 129), making void any stipulation in a contract for transmission of a telegram requiring notice of claim of damages to be given within less than 90 days as a condition to the right to sue, and not the same as the common law on the subject." Opinion by WILLSON, CH. J. Rehearing denied, June 3, 1909.

In *WESTERN UNION TELEGRAPH CO. v. HOLLEY*, (*Texas Civil Appeals*, April, 1909) 119 S. W. 888, appeal by defendant from judgment for plaintiff for \$380, in an action for damages for failure to deliver a "death message," judgment for plaintiff was *affirmed*. It was *held* that mistakes in the address of a telegram do not relieve a telegraph company from liability for negligent delay in delivering the message.

In *WESTERN UNION TELEGRAPH CO. v. COBB*, (*Texas Civil Appeals*, March, 1909) 118 S. W. 717, appeal from judgment for plaintiff in action for damages for mental anguish caused by negligent failure of defendant to transmit and deliver with reasonable promptness a "death message" relating to plaintiff's son, judgment for plaintiff for \$1,200 was *affirmed*. Rehearing denied, April 1, 1909.

In *WESTERN UNION TELEGRAPH CO. v. POWELL*, (*Texas Civil Appeals*, March, 1909) 118 S. W. 226, action for damages for failing to transmit and deliver a "sick message," judgment for plaintiff for \$750 was *affirmed*. The syllabus in 118 S. W. (para. 1) states: "A message requesting the sendee to meet the sender and his wife at a station was notice to the telegraph company that the purpose of the message was to have the father of plaintiff's wife meet the sender and wife at the station, and that the wife was ill. It also knew that it was stormy. It failed to deliver the message, requiring the sender to hire a livery to take his wife to her father's home. *Held*, that the company was liable for the injuries sustained by the sender and his wife from the inclement weather as the proximate result of the failure to deliver the message." Opinion by RICE, J. Rehearing denied, April 14, 1909.

IN *POSTAL TELEGRAPH COMPANY OF TEXAS v. HARRISS*, (*Texas Civil Appeals*, May, 1909) 121 S. W. Rep. 358, appeal from a judgment for plaintiff for \$350, it appeared that "Langdon Harriss brought this suit against two defendants, one designated the Postal Telegraph Cable Company, and the other designated the Postal Telegraph Cable Company of Texas, seeking to recover damages on account of alleged delay and negligence in transmitting and delivering a telegram sent by the plaintiff from Waco, Tex., to E. P. Dismukes at Columbus, Ga. The Postal Telegraph Cable Company filed no answer, and judgment by default was rendered against it. The Postal Telegraph Cable Company of Texas filed an answer to the effect that, by the terms of the contract under which it received the message, it was stipulated and agreed that if it was to be transmitted over any other line, defendant would act as agent for the plaintiff in delivering it to the other line, and was not liable for default or negligence on the part of such other line. It was also alleged that the defendant's line did not extend all the way to Columbus, Ga., and that the message was delivered by the defendant Postal Telegraph Cable Company of Texas to its codefendant, Postal Telegraph Cable Company at Memphis, Tenn., and transmitted from there by the latter company. The plaintiff filed a replication to the defendant's answer, consisting of a general demurrer and a special plea, setting up certain facts which he alleged rendered the Texas Cable Company liable for the negligence of the other defendant." The court (per KEY, J.) reviewed the evidence relating to the telegram as to buying bank stock, and held that defendant was liable for the loss sustained by plaintiff in the negligent delay in transmitting and delivering the telegram. Judgment for plaintiff *affirmed*.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. v. WOODRUFF.

Supreme Court, Arkansas, January, 1909.

CARRIER OF PASSENGERS—DUTY TO INSANE PASSENGER.—

When a passenger unattended becomes insane upon the train it is the duty of the railway company to remove such passenger, where the comfort and safety to other passengers on the train require it; but in performing this duty to the other passengers it must not neglect the duty it owes to the unfortunate insane and helpless one who is also a passenger (1).

1. For actions relating to the duty and liability of carriers towards insane passengers, see Vols. 2-10 AM. NEG. CAS., where the cases relating to passengers are duly classified from the earliest period to 1896 and arranged in alphabetical order of States. Subsequent cases to date will be found in Vols. 1-21 AM. NEG. REP., inclusive. See also the title of "Carriers of Passengers" in the new edition (1909) of the AMERICAN NEGLIGENCE DIGEST, which covers all the cases reported in Vols. 1-20 AM. NEG. REP. decided from 1897 to 1907.

EJECTION FROM TRAIN OF INSANE PASSENGER—CARE AT DEPOT—LIABILITY OF CARRIER FOR INJURY.—Where plaintiff, a lady about sixty-seven years of age, became temporarily insane while a passenger on defendant's train, and was removed from train by defendant's servants and placed in the waiting room of a depot, but owing to alleged lack of care on the part of servants at said depot was injured, the railroad company was liable for the injuries sustained by such passenger, and was not relieved from such liability from the fact that the sheriff, in his individual capacity, attended and cared for such passenger, after he had been informed of her condition.

EXCESSIVE DAMAGES.—Where plaintiff, in an action for damages for injuries sustained by being ejected from defendant's train and left at a depot while she was temporarily insane, recovered a verdict of \$1,000, and it appeared from the evidence that her only injuries were "bruises on her body," "she had a great place," an abrasion "on her wrist," she was confined to her bed a couple of days, but no permanent injury was shown nor was exemplary damages claimed, it was *held* that \$1,000 was excessive damages, and that \$100 would be ample compensation for the mere physical injuries received.

APPEAL from Circuit Court, Clark County.

ACTION by Mrs. Callie Woodruff against the St. Louis, Iron Mountain & Southern Railway Company. From judgment for plaintiff for \$1,000 defendant appeals. *Affirmed on condition of remittitur.*

Appellee sued appellant, alleging: That she was a passenger on appellant's road from Memphis, Tennessee, to Cleburne, Texas, that while en route appellee became temporarily insane and was unable to care for and protect herself; that appellant, in wanton disregard of appellee's rights as a passenger, did unlawfully, wrongfully, and with force and violence, against appellee's protests eject her from its train at Arkadelphia, about the hour of midnight, where it was dark, and did then and there, to the great wrong, injury, and damage to appellee, leave her wholly among strangers, without making any proper provision for her protection, comfort, and personal safety; and that appellant's employees knew at the time that appellee was ill and in a helpless condition. The complaint further alleged as follows: That being left at said station in such condition, plaintiff remained there until a late hour in the afternoon of next day, during all of which time she continued to be ill and temporarily insane, without mental capacity to care or provide for herself; that while she remained at said station she wandered about the premises and grounds, and, for want of capacity to take care of herself, she several times stumbled and fell upon piles of freight or other obstacles in her course which caused her to suffer wounds and bruises to her person and from the effects of which said wounds and

bruises plaintiff suffered much physical pain and for a long time thereafter; that as a result from such wrongful expulsion plaintiff was wrongfully detained on her journey for the space of twelve hours or more among entire strangers and without a comfortable place to lodge or rest, and suffered great mental pain and anguish. Prayed judgment for \$7,000 compensatory damages and \$1,000 punitive damages. The answer specifically denied all the material allegations of the complaint.

Appellee, a lady of sixty-seven years of age, was a passenger on appellant's train from Memphis, Tennessee, to Cleburne, Texas. She was sane when she took passage at Memphis, but after leaving Little Rock she became temporarily insane. Her conduct became more and more annoying to the other passengers. The conductor and others on the train endeavored to quiet and restrain her, but finally her speech and manner became so obscene, violent, and obnoxious to the other passengers that the conductor at Malvern sent a message to the trainmaster asking what he should do. The trainmaster answered: "If passenger referred to is annoying passengers and cannot be controlled, return her transportation and put her off at Arkadelphia, advising." At Arkadelphia they put her off. She refused to get off, and two or three of the trainmen took her up by the arms and forced her off. They lifted her off and carried her into the station, using no more force than necessary. She was put in the waiting room for the whites. It was a new depot, and a nice waiting room, provided with seats for passengers, but none on which they could recline. It was about eleven o'clock at night. Those who put her off saw no other employee there except the night operator, and they turned her over to him and told him to take care of her; but he says, when she came that night, he asked her if there was anything he could do for her, and she cursed him and told him to get out, and he went out the office window then. Another witness says, after she was carried into the station, he "saw the night operator at the window, asked where he was going, and he said he was leaving." Didn't see any one left there with her. The sheriff of the county testified, in part, as follows: "Two drummers came to my house after the train went South that night, and told me that an old woman was put off the train by force; that she was raving and would probably wander out and be drowned in the rice-pond nearby, and that she was in a condition to do so, unless somebody looked after her. I told them it was not my special duty, but for humanity's sake I would do so. I went down there, found her standing across the window sill with one leg out; * * * half a dozen boys

standing on the outside talking back and forth with her. * * * She was abusing them, and I made them go away. There was no one else there but the night operator, who was looking through the window, until the night watchman came down a while. She said she was awful tired, and I went back to the house and got some blankets and a pillow, carried them down, and made her a bed of them on the floor and she laid down, but after three-fourths of an hour she got up and said she was too tired to lie down. * * * She was insane. * * * Next morning told Clark (the agent) he would have to make some arrangement for her, and he asked me what she was doing there. There was no one at the station when he got there that night except the operator, and he was on the outside. There are about 4,000 inhabitants in Arkadelphia. * * * Said he stayed with the woman all night. There was no seat in the station upon which the woman could recline. The only furniture in the waiting room was seats and a stove. The operator was sometimes in his room and sometimes out. I had some talk with the operator in charge of the depot, and he said he was glad I came to take charge of the woman, that "she could take charge of the whole damned thing so far as he was concerned." Another witness testified that he was at the depot early next morning when the sheriff was giving her breakfast and was with the appellee an hour or more after he left, and that she kept wandering around through the baggage room and one place and then another. Witness helped her up four times when she fell. After this witness left, the city marshal took charge of her. He detailed her conduct after he took her in charge, showing that she was insane. He and a gentleman whom he asked to assist him kept her till the train came. They took her into the baggage room to restrain her. She tried to get away, and would bite and scratch. When the passenger train came going to Texas, they lifted her upon the train and put her in charge of the trainmen, who promised to look after her. She arrived at Cleburne, Tex., where her son lived. She was brought to her son's place of business by a friend of his. Her mental condition was still abnormal. She had an abrasion on her wrist and complained of bruises on her body, and complained of her back, hips and arm. She suffered that way for a couple of weeks after she got to his home and was confined to her bed a couple of days.

Appellant excepted to various rulings of the court in giving and refusing requests for instructions. It will be unnecessary to set all these out, but such as we desire to comment on specifically will be stated in the opinion. Appellee's counsel, in his closing argument,

used this language: "They could have arranged for a physician for plaintiff. They could have provided a cot for plaintiff to have rested or lain upon." To this appellant objected and excepted to the ruling of the court. From a verdict and judgment for \$1,000, this appeal has been duly prosecuted.

T. M. MEHAFFY and E. B. KINSWORTHY, for appellant.

JOHN E. BRADLEY, for appellee.

WOOD, J. (after stating the facts as above). — First: Appellee based her cause of action at the trial upon the alleged negligence of appellant after appellee's ejection from the train. "In leaving her wholly among strangers, without making any proper provision for her protection, comfort, and personal safety." The court told the jury that: "The only element of damage or injury the jury are authorized to consider is actual personal physical injury received by plaintiff (appellee) after being left at Arkadelphia. The fact that plaintiff was tired or worried will not alone authorize a verdict for the plaintiff." The issue of punitive damages was not submitted to the jury. The appellee, so far as this record discloses, did not ask on the trial for exemplary damages. Therefore the only questions we have to consider on this appeal are whether or not the issue of appellant's negligence, as above indicated, was properly submitted to the jury, and whether or not the verdict was sustained by the evidence. When a passenger unattended becomes insane upon the train, it is the duty of the railway company to remove such passenger, where the comfort and safety to other passengers on the train require it; but in performing this duty to the other passengers it must not neglect the duty it owes to the unfortunate insane and helpless one who is also a passenger. This court, in *Price v. St. L., I. M. & S. R. Co.*, 75 Ark. 479, 88 S. W. 575, in the case of a passenger who was insane from intoxication, used the following language: "The railroad company must bestow upon one in such condition any special care and attention beyond that given to the ordinary passenger which reasonable prudence and foresight demands for his safety, considering any manner of conduct or disposition of mind manifested by the passenger, and known to the company, or any conduct or disposition that might have been reasonably anticipated from one in his mental and physical condition, which would tend to increase the danger to be apprehended and avoided. If its servants, knowing the facts, fail to give such care and attention, and injury result as the natural and probable consequence of such failure, the company will be guilty of negligence and liable in damages for such injury." This doctrine is apposite here. While

a railway company has the undoubted right to eject an insane passenger, it must be done in a reasonable manner; due regard being had to the time, place and circumstances, so as to provide for the temporary protection and comfort of such passenger. As is well said by the Supreme Court of Louisiana: "None of the cases hold that the right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well-being of the ejected passenger." *Cathrine Conolly v. Crescent City R. Co.*, 41 La. Ann. 57, 8 Am. Neg. Cas. 309, 5 So. Rep. 259, 6 So. Rep. 526 and cases there cited; 1 Fetter, Carr. Pass. p. 263, note; Moore on Carriers, p. 622. While the instructions were open to some criticism as to verbiage, upon the whole they correctly declared the law upon the issue here presented, and we find no reversible error in any of them.

Second: The court gave the following instruction on the burden of proof: "The burden of proof is upon the plaintiff in this case to show by a greater weight or preponderance of the evidence that she was put off the train in the manner as alleged in the complaint, and left in condition as therein alleged, and she will not be entitled to recover anything until she has shown these facts by a preponderance, or a material part, of the evidence as they are alleged in the complaint." This instruction was erroneous. The words "or a material part" are not synonymous with the word "preponderance." A "material part of the evidence" might or might not be a "preponderance" thereof. The instruction was complete without adding the words "or a material part," and the court erred in inserting these; but, inasmuch as there was no conflict in the evidence as to the salient facts upon which the liability of the appellant was predicated, the instruction could not have been prejudicial.

Third: The appellant, among other requests, presented the following: "If you believe from the evidence that plaintiff was put off the train at Arkadelphia and placed in the white waiting room of the depot and remained in said depot until the sheriff came and took charge of her, then the defendant is not liable for anything that occurred after the sheriff got to her." Appellant contends that this request should have been granted under the authority of section 4049, Kirby's Dig., which provides that: "Insane persons found at large, and not in the care of some discreet person, shall be arrested by any peace officer, and taken before a magistrate of the county, city or town in which the arrest is made." The statute has no application to cases like this. Appellee, in law, was not an insane

person at large. She was the passenger of appellant still, although ejected from its train. She was, at the time the sheriff took charge of her, in appellant's waiting room and in the care of appellant's night operator, to whom she had been intrusted when she was ejected from appellant's train. True, the evidence discloses that this operator went out at the window when appellee went into the waiting room. Still, under the law, he was in charge of her as appellant's agent. His discretion, it appears, caused him to abandon in haste the poor unfortunate left in his care; but the law required that his discretion should be exercised in the direction of her comfort and safety, and not in leaving her to her fate. His duty was to exercise such care as any reasonably prudent person should under the circumstances, to protect her against harm and to provide for her comfort. If he was so alarmed that he could not do this himself, it was his duty to call to his assistance others who could. He wholly failed to discharge his duty, and for any injury that resulted to appellee from this cause appellant was liable. The sheriff was not requested by appellant's agent to take charge of appellee, and he did not do so in his official capacity. The custody he took of appellee, as he says himself, was not in his official, but individual, capacity. His kindly offices were interposed in the interest of humanity and by way of assistance rather to appellant, for he kept appellee at the depot, and when he went away left her in charge of appellant's station agent. Doubtless the kind attention of the sheriff and others who voluntarily cared for appellee after she was ejected from appellant's train prevented her from receiving greater injuries than she is shown to have sustained. As appellant, under the instructions, could only be liable for the actual physical injuries appellee received, this generous assistance of volunteers in preventing further injury inured to the benefit of appellant, but did not relieve it of liability for the actual damage done.

Fourth: The argument of counsel was not prejudicial. He was not declaring that it was the duty of appellant under the law to provide a physician, but simply stating his opinion as to what, under the evidence adduced, the appellant in the exercise of ordinary care should or could have done. The facts were all before the jury, and it was for them to say what ordinary prudence required. Moreover, the appellant did not ask the court to make the specific ruling that it was the duty of appellant under the circumstances to have called a physician. We find no error in the ruling as it is here presented.

Fifth: The court, both at the request of appellee and of appellant, confined the jury in its assessment of damages to compensation for

the physical pain that appellee may have suffered through appellant's negligence. The allegations of the complaint were sufficient, and there was evidence to warrant the submission of the question of exemplary damages to the jury; but we cannot say as matter of law that appellee was entitled to such damages. Under the evidence it was a jury question, and, since the jury were not allowed to assess any exemplary damages, we are of the opinion that a judgment for \$1,000 is plainly excessive. The only injury she received and of which she complained, as discovered by the testimony of her son, were "bruises on her body," "she had a great place," an abrasion, "on her wrist," that was her "greatest complaint." She also complained of her back and hips. She was confined to her bed a couple of days. No permanent injury was shown. Nor is it shown exactly when and where she received the injuries described by her son. In the absence of any consideration for damages by way of punishment, our opinion is that the sum of \$100 would be ample compensation for the mere physical injuries which appellee received.

If she will in fifteen days remit, so as to make the judgment \$100, it will be affirmed; otherwise, reversed and remanded for new trial.

WHITE v. SPRECKELS ET AL.

Court of Appeal, First District, California, 1909.

LANDLORD AND TENANT—SERVANT OF SUB-TENANT INJURED BY EXPLOSION OF STEAM RADIATOR—LIABILITY.

—Where it appeared that the owner of a building leased the same to another person, the latter retaining possession and control thereof, who sublet the rooms for office and business purposes to various persons, and an employee of one of the sub-tenants was injured by the explosion of a steam radiator, the owner of the building could not be held liable therefor (1).

NEGLIGENCE—BURDEN OF PROOF.—Where a steam radiator exploded in one of the rooms of a building sublet to plaintiff's employer, and plaintiff was injured, the burden was upon the plaintiff to show that the accident or explosion was caused by defendant's negligence. The mere fact that an accident occurred is not generally of itself sufficient to au-

1. For other Landlord and Tenant cases arising out of injuries caused by defective premises, etc., from 1897 to 1907 see Vols. 1-20 AM. NEG. REP. See also title of "Landlord and Tenant" in the new AMERICAN NEGLIGENCE DIGEST (1909) where the cases in Vols. 1-20 AM. NEG. REP. are collated and classified.

thorize an inference of negligence; it must be proved by direct evidence, or by proof of facts from which the inference of negligence can be legitimately drawn by a jury

LANDLORD AND TENANT—EXPLOSION OF STEAM RADIATOR—EMPLOYEE OF TENANT INJURED—NEGLIGENCE—EVIDENCE—*RES IPSA LOQUITUR*.—Where an employee of a tenant was injured by the explosion of a steam radiator, and it was alleged that the cause of the explosion was the negligent construction and defective condition of the radiator, but it appeared that the radiator was not under the exclusive management of defendants, being in the rooms of plaintiff's employer and used for the tenant's purposes and not for the purpose for which it was placed in the room, the rule of *res ipsa loquitur* was not applicable (2).

APPEAL from Superior Court, City and County of San Francisco.

ACTION by Irene H. White against John D. Spreckels and another. From a judgment for defendants, plaintiff appeals. The case is stated in the opinion. On rehearing, *judgment affirmed*.

LOUIS S. BEEDY (P. F. DUNNE, of counsel), for appellant.

J. J. LERMEN, for respondents.

COOPER, P. J.—In November, 1909, we filed an opinion in this case, in which we affirmed the judgment as to defendant Claus Spreckels, and reversed it as to defendant John D. Spreckels. Upon a petition for a rehearing being filed, we were doubtful of the correctness of our former decision as to John D. Spreckels, and the case has been reargued and additional briefs filed. After a careful consideration of all the authorities cited, we have reached the conclusion that our former opinion proceeded upon a theory which omitted an important element in the case, and was therefore erroneous. The action was brought to recover damages for personal injuries inflicted as the result of the bursting of a steam radiator in one of the rooms of the Claus Spreckels Building in the city and county of San Francisco. After plaintiff had introduced her testimony and rested the court granted a nonsuit, and judgment was entered for defendants. This appeal is from the judgment on the judgment roll and a bill of exceptions.

The facts as shown by the record are as follows: "The defendant, Claus Spreckels, is the owner of the building known as the Claus Spreckels Building. In June, 1898, he leased to defendant John D. Spreckels the entire building, with the power house, heating plant, and appurtenances, and thereafter up to the time of the plaintiff's

2. See Note on the Doctrine of *Res Ipsa Loquitur*, in 3 AM. NEG. REP. 488-496.

injuries the defendant, John D. Spreckels, retained possession and control of the entire building, power house, heating plant, engine boilers, and appurtenances, and underlet rooms in the building to the many tenants, to whom he gave leases of the respective rooms so underlet. On the 28th day of February, 1902, defendant John D. Spreckels executed a written lease to Edith M. McLean of several rooms on the second floor of said building, to be used as hair physician's offices, said lease to continue for one year at a specified monthly rental. This latter lease recited that the premises so leased were then in a tenantable condition; that they should not be altered, repaired, or changed without the written consent of the lessor; that all alterations, changes, or improvements should be done by or under the direction of the lessor. The lease further provided that the lessor should furnish to the lessee free of charge janitor service, steam heat, and electric lights, and that the lessor should have the right to enter upon the premises at all reasonable hours to examine the same, to make such alterations and repairs as should be deemed necessary for the safety or preservation of the building. The lessee entered into possession of said leased rooms, and so continued up to the time of the injuries to plaintiff. On the 11th day of December, 1902, plaintiff being a servant or employee of the said McLean, while in one of the said rooms engaged in the discharge of her duties, was severely burned and injured by the escape of steam and hot water from the steam radiator which exploded, and thus allowed the steam and hot water to escape with great force into the rooms and on and over the plaintiff. No evidence was offered by plaintiff as to any direct act of negligence by the defendants or either of them, but she relied upon the maxim, "*Res ipsa loquitur*," claiming that the explosion of a steam radiator is something which does not ordinarily happen where reasonable and proper care is taken to avoid it, and that the bursting of the radiator under the circumstances of this case raised a presumption of negligence, and thus placed the burden of proof upon defendants to show that reasonable and proper care was used. As to defendant Claus Spreckels, he had surrendered possession and control of the entire building, engine, heating plant and pipes to his codefendant by and under the terms of the lease made to him. He was not in privity with, and owed no duty to, the tenant of John D. Spreckels. He had no right of supervision or of access to the building, nor had he the right to inspect or repair the pipes or heating apparatus. It was conceded in the argument on rehearing that the former decision was right as to defendant Claus Spreckels.

The complaint alleges that the radiator exploded by reason of being negligently constructed and kept, and being allowed to remain in a defective and neglected condition. The former opinion proceeded upon the theory that the defendant, John D. Spreckels, allowed an excessive pressure of steam to be conveyed through the pipes and into the radiator, thus causing the explosion, and being the sole cause of the explosion. We find upon a further examination that there is no allegation in the complaint as to any negligence other than as to the defective construction and condition of the boiler, machinery, pipes, and radiators. The burden was upon plaintiff to show by competent evidence that the accident or explosion was caused by defendants' negligence. The mere fact that an accident occurred is not generally of itself sufficient to authorize an inference of negligence. It must be proved by direct evidence, or by proof of facts from which the inference of negligence can be legitimately drawn by a jury. As the court granted the motion of defendants for a nonsuit, the test as to the correctness of the ruling must be determined by the evidence in the record. If the evidence is sufficient, or would have been sufficient, to support a verdict for plaintiff, then the ruling is erroneous; but if the evidence taken by itself, with all inferences which can be legitimately drawn from it, would not be sufficient to sustain a verdict, then the ruling is correct.

The evidence on the part of the plaintiff is brief. She testified as to the fact of her injuries by the escaping steam, and the fact that the explosion occurred on the 11th day of December, 1902. Her language is: "I was drying towels on the radiator. It was my duty to take the wet towels handed me by Miss Hopkins, and put them on the radiator to dry." She did not state any fact or circumstances tending to show why the radiator exploded, except the fact that it exploded while she was putting wet towels on it. Plaintiff further called one Scott, who testified that he was engaged in the hot water and steam heating business and was in the years 1901 and 1902 employed by George H. Tay & Co., and that he worked in putting in pipes, heating apparatus, and radiators in the Claus Spreckels Building; and in his own language he states as follows: "All the drift piping from all of the radiators in the building are connected to a general air line that is open at the low end, and by opening this valve it was supposed to prevent any greater accumulation of pressure in the radiators. It was to prevent the accumulation of pressure in the radiators. The handle of that valve was sawed off by me to prevent its being used. There was no seat at the valve. It was a core. It would not operate when the handle was sawed off unless somebody

put a wrench or pliers on the handle and turned it. It was in a position so that it afforded, unless tampered with, permanent relief to the radiator. It was wide open before I sawed the handle off. The handle was sawed off when I left. I sawed the handle off as a precaution of safety. Before leaving, I turned the steam on to see if our work was in good order and no leak. The firm I worked for received payment, I believe, and said it was all right. I did not find anything wrong with my work after I turned the steam on. I made that test before I left the work. To the best of my knowledge, the work was all right or we would not have left it. It was first-class work. I did this work about four years ago." The evidence thus showed that the work of putting in the radiator was first-class, and that it subsequently exploded while plaintiff was putting wet towels on it. It shows that the explosion occurred while the radiator was being used for a purpose for which it was not designed. Whether the radiator exploded for the reason that it had not been kept in proper condition by the lessee of defendants, or for the reason that it had been weakened by its constant use by defendants' lessee in drying wet towels, or for the reason that it had been tampered with by the lessee after she had taken possession of the rooms, or for the reason that too great a pressure of steam was in the pipes and radiator, are matters of conjecture. There is no presumption that defendants were guilty of negligence from the mere fact that the radiator exploded without any regard to the circumstances, or the use to which it was being put by the lessee or her employees. The test of the doctrine of *res ipsa loquitur* which has generally been followed in the courts of England and this country is given in *Scott v. London & St. K. Dock Co.*, 3 H. & C. 596, (3) as follows: "There must be some evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, and that occurrence is such as, in the ordinary course of things,

3. In *SCOTT v. LONDON & ST. KATHERINE DOCK CO.*, 3 H. & C. 596 (1865), it was held that in some cases of accident, the fact of the accident itself is *prima facie* evidence of negligence in the owner of the place where it happens, as where goods fell from a warehouse on to a public highway. In this case, a custom-house officer, while on the premises of the dock company, in the execution of his duty, was injured by some

bags of sugar falling on him from a crane fixed over a doorway, under which he was passing. *Held*, that as the accident was such as did not in the ordinary course of things happen to those who have the management of machinery and use proper care, it afforded reasonable evidence of negligence by the dock company, for which the company was liable to compensate the custom-house officer.

does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the occurrence arose from want of care." This case does not come within the test. The thing which exploded was the radiator. It was not under the exclusive management of the defendants or their servants. It was in the rooms of the lessee, being used by her servant for her own purposes, and not for the purpose for which it was placed in the room. The steam which was supplied to the radiator was under the exclusive management of the defendant, John D. Spreckels; but there is nothing to show that the explosion was caused solely by too great a pressure of steam in the radiator. In fact, there is no such allegation in the complaint. The thing which injured the plaintiff was the escaping steam. It escaped for the reason that the radiator exploded. The cause of the explosion is a matter of conjecture from the evidence in this record.

This is in line with the leading cases. In *Peters v. Lynchburg Light Co.*, 108 Va. 333, 61 S. E. 745, the plaintiff was injured by receiving a shock from an overcharged wire while turning off an incandescent light in his kitchen; the electrical appliances being owned and controlled by the plaintiff. The court held that the doctrine of *res ipsa loquitur* did not apply, holding that the thing which caused the injury must be under the exclusive control and management of the defendant before the rule can be invoked. In the opinion it is said: "But the doctrine of *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff, nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible." In *Independent Brewing Ass'n v. Schaller*, 128 Ill. App. 533, it was held that the doctrine could not be applied where an explosion of gas occurred: The lamp and appliances being furnished by defendants, but were under the control of plaintiff. The court said: "But a fatal objection to the application of the doctrine contended for—the doctrine of *res ipsa loquitur*—in this case is that it is not applied unless the thing causing the accident is under the control of the defendant or his servants, and the electrical lamp and its appliances in this case were not under the control of the defendant or its servants. Thompson on Negligence, § 7635. Here the defendant only furnished the lamp, its appliances, and the current. Winkofsky and his servants had the control of the lamp, and they only were in the tank when the explosion occurred. The cause of the explosion is left by the evidence a matter of conjecture, sus-

picion, or surmise." The true rule, in our opinion, is laid down in *Searles v. Manhattan R. Co.*, 101 N. Y. 661, 5 N. E. 66, as follows: "Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which defendant is responsible but not for the other, plaintiff must fail if the evidence does not show that the injury was the result of the former cause. If under the testimony it was just as probable that it was caused by the one as the other, he cannot recover." In *Ryan v. Fall River Iron Works*, 200 Mass. 188, 86 N. E. 310, the Supreme Court of Massachusetts said: "The occurrence of an accident standing alone is not always evidence of negligence. It may be as consistent with the innocence as with the fault of the person controlling the agency by which the accident happened. When the precise cause is left to conjecture, and may be as reasonably attributed to a condition for which no liability attaches as to one to which it does, then a verdict should be directed against the plaintiff." To the same effect, see note to *Mitchell v. Chicago & A. Ry. Co.*, 132 Mo. App. 143, 112 S. W. 291; *Warner v. Railway Co.*, 178 Mo. 125, 77 S. W. 67; *McGrath v. St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872; *Robinson v. Empire City Subway Co.*, 53 Misc. Rep. 593, 103 N. Y. Supp. 717; *Strasburger v. Vogel*, 103 Md. 85, 63 Atl. 202, 20 Am. Neg. Rep. 99.

As we have before said the evidence does not clearly show that the accident was caused by an excessive pressure of steam. Nor is it so alleged in the complaint. If we rely on the doctrine of probabilities, we might as reasonably infer that the explosion was caused by the use of wet towels upon the radiator, or by reason of the radiator having been changed or weakened by its use by the lessee, as that it was caused by an excessive pressure of steam. The evidence is not such as to raise a presumption which shows that the defendants were guilty of negligence.

Plaintiff contends that the answer of defendants did not deny the allegation of the complaint that "the defendants had exclusive management and control of the steam engine and so forth and steam radiators and connections." While the answer does not specifically deny this allegation, it affirmatively and expressly alleges that the lessee of defendant had exclusive management and control of the rooms and the fixtures therein contained, including the radiator and its connections. This was an express averment in the answer contrary to the averment of the complaint, thus raising an issue, and was equivalent to a denial. *Miller v. Brigham*, 50 Cal. 615; *Mc-*

Donald v. Davidson, 30 Cal. 173. Not only this, but on the motion for a nonsuit no such suggestion appears to have been made; and, where the parties have proceeded upon the theory that the answer raises an issue in the court below, they will not be allowed to raise the question here for the first time.

It follows from what has been said that the judgment must be affirmed, and it is so ordered.

We concur: KERRIGAN, J.; HALL, J.

Rehearing denied by the Supreme Court, May 17, 1909.

THUNBORG v. CITY OF PUEBLO.⁽¹⁾

Supreme Court, Colorado, April, 1909.

MUNICIPAL CORPORATIONS — COLLISION WITH HYDRANT IN STREET — CONTRIBUTORY NEGLIGENCE OF DRIVER. — In an action against a city for injuries sustained by the driver of a wagon in a collision with a fire hydrant while driving along a traveled way, where it appeared from the evidence that plaintiff was driving at a rapid rate of speed, that he knew of the condition of the street, and could plainly see in front of him, that he turned his horse out of the beaten way and ran into the hydrant that was concealed by weeds, etc., the verdict for the city was justified on the ground of plaintiff's own want of due care and caution regardless of whether the city was or was not negligent.

STREETS — DUTY AND LIABILITY OF CITY. — It is the duty of a city to maintain its streets in a reasonably safe condition for ordinary travel by persons using due care, and for injuries caused by the city's negligence it will be liable, but not if the injured party could have avoided the injury by using due care.

ERROR to District Court, Pueblo County.

ACTION by C. A. Thunborg against the City of Pueblo. From judgment for defendant, plaintiff brings error. The facts appear in the opinion. *Judgment affirmed.*

1. See former decision in this case, *Thunborg v. City of Pueblo*, 18 Colo. App. 80, 12 AM. NEG. REP. 220, 70 Pac. 148, where judgment for the city was reversed for an erroneous instruction on contributory negligence.

For accidents similar to that in the case at bar, see Vols. 1-21 AM. NEG. REP.

See also, the AMERICAN NEGLIGENCE DIGEST (1909 edition) under titles, HIGHWAYS, MUNICIPAL CORPORATIONS, OBSTRUCTIONS, etc.

M. J. GALLIGAN, for plaintiff in error.

D. A. HIGHBERGER and JOHN A. MARTIN, for defendant in error.

MUSSER, J. — On the evening of June 24, 1898, plaintiff in error was driving north on Court street in the City of Pueblo, and on the east side of Court at or near its intersection with Twenty-Second street, the vehicle in which he was riding came into violent collision with a fire hydrant, and he was thrown out, sustaining serious injuries. He commenced this action against the city to recover damages. The complaint alleged that the city was negligent in maintaining and allowing the hydrant to be in dangerous proximity to the traveled way and in allowing weeds and brush to grow around and obscure it. The answer denied that the city was negligent, and alleges that the injury was caused by the negligence of plaintiff, that the plaintiff was negligent in driving at a rapid rate of speed, and in turning out of the traveled way without due care and caution, which negligence on part of plaintiff caused the injuries complained of. The trial was before a jury, and the verdict and judgment were for the city. The case was tried before with the same result. From the first judgment the plaintiff appealed to the Court of Appeals, where the judgment was reversed. *Thunborg v. City of Pueblo*, 18 Colo. App. 80, 12 Am. Neg. Rep. 220, 70 Pac. 148. In the record now before us the facts appear to be fuller and somewhat different, in certain particulars, from those on the former appeals, owing no doubt to the effort of counsel to clearly show what was before obscure, and the instructions now conform to the views expressed by the Court of Appeals.

It appears from the evidence that the place where the hydrant was situated was in a sparsely settled part of the city, and, while there was considerable travel along Court street, it was light as compared with the travel on streets in the business and thickly settled sections. The evidence of plaintiff's witnesses showed: That there was a way for travel, one said about thirty-five feet wide, another sixty or seventy feet, between the brush or weeds on either side; that this way was in the condition that unpaved streets usually are; though opposite and to the west of the hydrant, they testified, that at times there was a puddle of mud, and to avoid this the beaten way turned toward the hydrant, and at this time one witness testified that the hydrant was within fourteen inches, another within four to six feet, of the edge of the beaten way. The evidence for plaintiff shows that at this time there was but a narrow way, scarcely wide enough to permit two vehicles to pass, between the hydrant and the west side of the street without getting into the mud and mire to the

west of this traveled way. It was admitted that the fire hydrant was about two and one-half feet high, and that it was between the curb and lot line, at the usual and proper place for such a fixture. Mr. Warner, one of plaintiff's witnesses, testified, without contradiction, that the hydrant was in line with the trees and poles along the street. This hydrant was more or less obscured by sunflowers and sagebrush, which appear to have been growing to a greater or less extent on the vacant blocks and unused portions of the streets. It had been there for several years. Plaintiff testified he had never seen it and did not know it was there. He also testified he had never driven past this hydrant to and from his home almost daily for about eighteen months prior to the accident. Others of plaintiff's witnesses testified that it could be seen through the weeds when one was on the way directly opposite to it, and that it was not so much hidden in the winter as in the summer. Under these circumstances, the jury may well have believed that the plaintiff knew of this hydrant. While no curb was constructed, or, if constructed, had been washed away, the evidence showed that the curb line was defined by a furrow, from which the street had been at one time graded.

Aside from the existence of the hydrant it is clear that the plaintiff knew of the condition of the street and the care that the city took of it. The plaintiff testified that he was driving north on Court street at an ordinary trot, and when he approached the intersection of Court and Twenty-Second streets he saw another person in a buggy coming toward him. In order to permit the passage of the approaching vehicle between him and the mud, he turned his horse to the right into the weeds, his vehicle struck the hydrant, the horse broke from the wagon, and the plaintiff was thrown to the ground. He also testified that it was not dark, that he could plainly see the approaching vehicle, but did not look to ascertain whether the person approaching had turned out of the road. The person who was approaching the plaintiff testified for the defendant. He said he heard the noise of plaintiff's wagon, coming toward him, and that he turned west to the right off the traveled way, so as to give plaintiff the entire way. At the time the plaintiff's vehicle struck the hydrant, the other vehicle was on the west side of the street almost opposite the hydrant, and from fifteen to twenty feet from the west of the traveled way, or, as the beaten way was eight or nine feet wide, from twenty-three to twenty-eight feet west of the east side of the way. In other words the plaintiff had all the beaten way to himself. This testimony is uncontradicted. This witness also testified that, when the plaintiff was thrown out, the witness walked directly across the

twenty-three to twenty-eight feet between them and encountered no mud or mire, and so far as he could see the roadway was good, though he claimed it was too dark to see well. This witness also stated that plaintiff was driving at a rapid rate, about twelve miles an hour, and when the vehicle struck the hydrant the horse was freed from the wagon and never stopped. Another witness testified that he was driving north on Court street, and heard a horse and vehicle coming behind him making a great noise. The witness drove his horse as fast as it would go to keep out of the way but, the horse behind gaining on him, the witness turned out at an unusual place. The horse behind continued on at the same speed, turned into the weeds, ran the vehicle against the hydrant, stopping it suddenly, and the horse without stopping, freed itself from the wagon.

The testimony of these two witnesses, coupled with the fact that the horse by the force of the collision was at once freed from the vehicle and continued on with unslackened speed, is wholly at variance with the testimony of plaintiff, that he was driving at an ordinary trot, unless he considers an ordinary trot to be a rate of speed that is ordinarily considered a furious one. Here then, from the testimony of plaintiff himself, and the uncontradicted testimony of others, is presented a case wherein it appears: That, aside from the presence of the hydrant, the plaintiff knew of the condition of the street where the accident occurred; that he could plainly see in front of him; that he had his horse under complete control; that he had the whole traveled way ahead of him for his own use, which he could have seen had he exercised a small degree of caution by looking; that, without any necessity therefor, he deliberately turned his horse out of the beaten way into the weeds to that part of the street designed for poles and trees and water hydrants, and encountered this hydrant concealed by the weeds and sagebrush. Under these circumstances it is clear that the verdict is justified upon the ground that it was the want of due care and caution on the part of plaintiff himself that caused his misadventure, regardless of whether the city was or was not negligent; and if we add to this the facts that there was sufficient evidence upon which to base a belief that plaintiff was driving at a rapid rate of speed, and that he knew of the existence of the hydrant, the justification for the verdict becomes even stronger.

It is the duty of a city to maintain its streets in a reasonably safe condition for ordinary travel by persons using due care and prudence in the use of the same, and if the traveler uses due care and prudence and sustains injuries, caused proximately by the negligence of the

city, it will be liable; but it will not be liable if the party injured could have avoided the injury by the exercise of reasonable and ordinary care and prudence. *City of Denver v. Utzler*, 38 Colo. 300, 88 Pac. 143. In a somewhat similar case, in which the plaintiff collided with a stone, placed by the town, and which was within from four to twelve inches of the traveled way, and hidden by grass, the Supreme Court of Massachusetts said: "We understand these instructions, taken in connection with what precedes, to say, in substance, that if the plaintiff, without any reasonable cause therefor knowingly drove out of the way prepared for travel, * * * and in that way was injured by contact with the stone, she could not recover; and such we understand to be the law." *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521.

The plaintiff says that error was committed in admitting testimony that plaintiff's horse was running away. The court told the jury, in one instruction, that if plaintiff's horse was running away, or beyond his control, that fact could not be considered as a want of due care on his part. There was some evidence that the horse might have been running away. As we have seen, plaintiff declared it was not, and we accept his statement as true. If the admission of this testimony was prejudicial to plaintiff, which we are unable to see, the instruction removed the prejudicial effect. We do not wish to be understood as holding that this instruction was sound law. Sound or unsound, it was not prejudicial to plaintiff. We refer to it simply to answer his assignment of error.

The plaintiff claims that the negligence of the city was clear, and that but one question, the amount of damages, should have been submitted. If such a course had been pursued, what would have become of the question of the contributory negligence of plaintiff? It is not clear that the city was negligent. The negligence of the city, the contributory negligence of the plaintiff, and the amount of damages were all submitted to the jury under proper instructions. This was the right way.

Complaint is made of instructions 2 and 4 given by the court. It is said that they are not based on the evidence, but it is not pointed out wherein they are not so based, and we are unable to see, without aid, that they do not conform to the evidence. It is further contended that these two instructions are inconsistent with each other, and also with No. 3, which plaintiff says is correct. In instruction No. 2 the court said that the city was not negligent in erecting the fire hydrant where it was. That is correct. The hydrant was lawfully in the street. In that instruction the court further said that

the only charge of negligence to be considered was the fact that the city permitted the hydrant to be obscured and hidden by weeds and brush. This was also correct, for the only negligence alleged in the complaint was the maintenance of the hydrant at the particular place and allowing it to be obscured by weeds and brush. As the hydrant was lawfully there, the city was not negligent in permitting it to be there. So that the only charge of negligence alleged in the complaint to be considered was that the city permitted the hydrant to be obscured by weeds and brush. In the fourth instruction, it is true, the court apparently said that two grounds of negligence were to be considered, to wit, permitting the hydrant to be obscured by weeds and brush, and maintaining the hydrant at the particular place. This, of course, apparently contradicted instruction 2, but the addition of another ground of negligence on the part of the city in instruction No. 4 could not be prejudicial to plaintiff. If the judgment had been against the city, it might have been prejudicial to the city. The plaintiff cannot complain of this. If there is any contradiction between 2 and 3 it is the same as the contradiction between 2 and 4, and is not prejudicial to the plaintiff. In instruction No. 2 the court did not say that all the city need do, when it opened a street, was to open a roadway wide enough for a single team to pass. What the court did say, in substance, was that it may open a street for travel for vehicles from curb to curb. It is true, the court used the word "middle," but by that the court clearly referred to that portion of the street between the curb lines; and the court further said in that instruction that, when it had so opened a roadway, it discharged its entire duty when it exercised reasonable care in keeping such roadway safe for travel in vehicles. It clearly charges the city with the duty of keeping the street in the particular place reasonably safe for travel from curb line to curb line. This may have imposed too great a duty upon the city, but it could not be prejudicial to plaintiff.

The plaintiff requested the court to instruct the jury that the city is bound to use reasonable care to keep its streets in reasonable condition for travel in an ordinary mode "by night as well as by day." This the court refused to do. The court, however, did so instruct the jury, except that it did not use the words "by night as well as by day." When the court said "a city was bound to use reasonable care to keep its streets in a safe condition for ordinary travel," it certainly included travel "by night as well as by day," without expressly using those words. Furthermore, the plaintiff testified that it was not night, and that it was not dark, and that he could see things plainly.

The other assignments of error, relating to the giving and refusing of instructions are not specific enough to merit the attention of this court. To merely say in the brief that an instruction given is wrong, and that an instruction refused is right, without pointing out wherein it is wrong or right, does not throw any light upon the error complained of.

We are unable to find any error in the record against the plaintiff, and the judgment will therefore be affirmed.

Affirmed.

STEELE, C. J., and CAMPBELL, J., concur.

HOXIE v. NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY.

Supreme Court of Errors, Connecticut, July, 1909.

CONSTITUTIONAL LAW—FEDERAL STATUTE RELATING TO EMPLOYEES—FELLOW SERVANT DOCTRINE—LAW OF PLACE—COURTS—JURISDICTION.—The Act of Congress, April 22, 1908, c. 149 (35 U. S. Stat. 65), making every railroad while engaged in interstate commerce liable for injuries to employees while employed in such commerce, fully discussed in its application to the common and statutory law of the several States governing master and servant cases in the issues presented in an action by an inhabitant of Connecticut against the defendant railroad company, a corporation organized under the laws of Connecticut, for an injury received by him while acting as a train hand and engaged in coupling cars on its railroad in Massachusetts, due to negligence of a fellow servant in control of another train belonging to the same defendant (1).

Held:

1. That Congress did not intend by the Act of April 22, 1908, c. 149 (35 U. S. Stat. 65), to authorize the institution of an action under it in the courts of the States.
2. That Congress had no power to make it incumbent on the State courts to assume jurisdiction of such an action.

1. See the AMERICAN NEGLIGENCE DIGEST (1909 edition), covering the series of AMERICAN NEGLIGENCE REPORTS, Vols 1-20, 1897 to 1907, where the cases in which the question of fellow servant is passed upon, and the various Statutes, Federal and State, discussed, are collated under the titles, CONSTITUTIONAL LAW, EMPLOYERS' LIABILITY ACTS, FELLOW SERVANT, MASTER AND SERVANT, RAILROAD COMPANY, etc.

3. That the issues before the trial court involving the consideration of the foregoing points, justified of themselves the dismissal of the plaintiff's action.
4. That the said Act, so far as it concerns the case at bar, is wholly void by reason of certain of its provisions which cannot be separated from the rest.

(Opinion by BALDWIN, CH. J.)

LAW OF OTHER STATES — PRESUMPTION.— In the absence of evidence to the contrary it is to be presumed that the law of a sister State is the same as the common law of Connecticut (citing *Lockwood v. Crawford*, 18 Conn. 370).

TORTS — LAW OF PLACE.— As to the merits and rights involved in actions, the law of the place where they originated governs, and this applies to tort actions (citing *Wood v. Watkinson*, 17 Conn. 550, 510).

MASTER AND SERVANT — FELLOW SERVANT — COMMON LAW.— At common law a servant cannot recover from his master for injuries received from the negligence of a fellow servant acting in the same line of employment, and this is a part of that general American common law resting upon considerations of right and justice that have been generally accepted by the people of the United States.

APPEAL from Superior Court, New London County, RALPH WHEELER, Judge, in an action by William H. Hoxie against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant rendered after sustaining a demurrer to the complaint, plaintiff appeals. *Affirmed.*

"Action by an inhabitant of Connecticut brought to the Superior Court of New London County against the New York, New Haven & Hartford Railroad Company, described as a corporation organized under the laws of Connecticut, for an injury received by him while acting as a train hand on its railroad at Auburn, in Massachusetts. The complaint alleged an injury received while the plaintiff was coupling cars in a train running from Norwich, Conn., to Worcester, Mass., and due to the negligence of a fellow servant in control of another train of the defendant running between Hartford, Conn., and Worcester; and claimed damages 'under and by force of the Act of Congress approved April 22, 1908 (35 Stat. 65, c. 149), relating to liability of common carriers by railroad engaged in commerce between the States.' A demurrer to the complaint was sustained and judgment rendered for the defendant."

HADLAI A. HALL and FRANK L. MCGUIRE, for appellant.

EDWARD D. ROBBINS and MICHAEL KENEALY, for appellee.

E. O. HARRISON and PHILIP DOHERTY, for the United States.

BALDWIN, CH. J. (after stating the facts). — The plaintiff bases his action solely on the Act of Congress of April 22, 1908 (35 Stat. 65 c. 149). His injury having been due to the negligence of a fellow servant, could throw no liability on the defendant had it occurred in the State, and were the question of liability to be determined by the common law of Connecticut. It did occur in Massachusetts, and he does not allege what the law of Massachusetts in respect to that question is. It is therefore to be presumed to be the same as that of this State. *Lockwood v. Crawford*, 18 Conn. 370.

If the plaintiff has a right of action, it must be based on the law affecting the relations of the parties at the time and place of the injury. As to the merits and rights involved in actions, the law of the place where they originated is to govern. *Wood v. Watkinson*, 17 Conn. 500, 510. This is true of tort actions. At least when a wrong having been done, actionable under the law of the place of its commission, there is nothing in the public policy obtaining at the forum to stand in the way of granting a remedy. 2 Wharton on Private International Law (3d Ed.), § 478b. The law of Massachusetts in respect to any claims on the defendant growing out of the plaintiff's injury being presumably the same as that of Connecticut, there can be no recovery unless by virtue of the Act of Congress which, if it affects proceedings in State courts, governs in each State alike. Congress has what may be prescribed in general terms as plenary power (Const. art. 1, § 8) "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Elsewhere in the Constitution certain limitations are specifically prescribed, and others may exist by virtue of the necessary implications from the dual system of political government — *imperium in imperio* — which that instrument created. By its provisions the sovereignty of each of the States is as carefully guarded as that of the United States. Each was to remain free to maintain its own executive, legislative, and judicial magistracies. Nothing could be done by Congress to impair this right in any State so long as it preserved a republican form of government. The power to maintain a judicial department is one incident to the inherent sovereignty of each State, "in respect to which the State is as independent of the general government as that government is independent of the States." As to that power, "the two governments are upon an equality." *The Collector v. Day*, 11 Wall. 113, 126. The judicial power of the United States is by the first section of their Constitution (article 2) "vested in one Supreme Court; and in such inferior courts as the Congress may from time to time ordain and establish," and by the second sec-

tion extends among other things, "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority." "The better opinion is that the second section was intended as a constitutional definition of the judicial power which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of 'cases' in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself." It has therefore held in the case from which this observation has been quoted that an Act of Congress investing justices of the peace appointed under the laws of a State with authority to arrest and temporarily imprison deserters from a merchant vessel was not objectionable on the ground that it gave them a judicial power belonging to the United States. *Robertson v. Baldwin*, 165 U. S. 275, 279, 280, 17 Sup. Ct. 326.

More recently the Supreme Court of the United States has stated that the first section of article 3 grants "the entire judicial power of the nation;" that the second section is neither "a limitation nor an enumeration," but "a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power;" and that "all the judicial power which the nation was capable of exercising" was vested in the tribunals described in the first section. *Kansas v. Colorado*, 206 U. S. 46, 82, 83, 27 Sup. Ct. 655. This power certainly included any authority which might be given them by Congress to take cognizance of judicial proceedings under statutes of the United States. "It is a sound principle that in every well-organized government the judicial power should be co-extensive with the legislative, so far at least as private rights are to be enforced by judicial proceedings." *Kendall v. United States*, 12 Pet. 524, 618.

We find, then, under our American system of government, each State possessing legislative power over most subjects, and having courts that may exercise a commensurate judicial power. The Act of Congress now in question creates a statutory right of action. It is one not existing at common law, nor in chancery. It is one which,

if warranted by the Constitution of the United States, may, under their general laws regulating the jurisdiction of the Circuit Courts of the United States (Acts Aug. 13, 1888, c. 866, 25 Stat. 433, U. S. Comp. St. 1901, p. 508), whenever damages exceeding \$2,000 are claimed, be made the subject of judicial proceedings in the courts of the United States as a suit of a civil nature arising under the laws of the United States without reference to the citizenship of the parties.

In view of these circumstances and conditions, two questions present themselves at the threshold of the present case. The first is whether Congress intended by this Act to authorize the institution of an action under it in the courts of the States. The second is whether, if such were its intention, it had power to make it incumbent on the State courts to assume jurisdiction.

The main provisions of the Act are these:

"Section 1. That every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee or where such injuries have resulted in his death the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Sec. 4. That in any action brought against any common carrier

under or by virtue of any of the provisions of this Act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for safety of employees contributed to the injury or death of such employee.

"Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act shall to that extent be void: Provided that in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the insured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"Sec. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued."

"Sec. 8. That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress."

Was it the intention of Congress to authorize the institution of the statutory form of action, thus created, in the courts of the States? At common law a servant cannot recover from his master for injuries received from the negligence of a fellow servant acting in the same line of employment. This is a part of the general American common law resting upon considerations of right and justice that have been generally accepted by the people of the United States, in administering which in any State the Federal courts have not deemed themselves bound by the judicial decisions of that State as to what according to its common law are the limits of that doctrine there. The Supreme Court of the United States has treated it as a rule of general jurisprudence, especially when invoked in cases arising in the course of commerce between States, and as justly supported by the principle that negligence of a servant resulting in an injury to a fellow servant does not of itself prove any omission of care on the part of the master in his employment, and only such omission of care can justify holding the master responsible. *Balt. & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 378, 386, 13 Sup. Ct. 914. The common law had established the fellow servant doctrine upon two main considerations: One that above mentioned, viewing it as a rule of jus-

tice; and the other, viewing it as a rule of policy, in that it tended to make each servant more watchful of his fellows, and thus to promote the safety of all, as well as the efficiency of their common work. Congress has now seen fit to give an action where the common law denied it. It makes a demand legal, which the common law deemed impolitic. It is not lightly to be presumed that these provisions were intended to found original proceedings in the courts of the States and to lay down for them new rules, not only of right and policy, but of procedure. *Carpenter v. Snelling*, 97 Mass. 452, 458. Sections 4 and 6 of the Act of 1908 clearly indicate that the action is one to be brought under the statute. The methods of procedure which are prescribed can all be easily pursued in the Federal courts. Some of them it might be difficult or even impossible to follow in the courts of a State. Others could only be observed there at the cost of setting up in the same tribunal conflicting standards of right and policy and practice.

This may be illustrated by a reference to the existing jurisprudence and legislation of this State. They allow a recovery for an injury resulting in death, whether instantaneous or otherwise, in an action surviving to or brought by the executor or administrator, of not exceeding \$5,000, provided suit be instituted within one year, the damages to be distributed after deducting the costs and expenses of suit, half to the husband or widow and half to the lineal descendants of the decedent, *per stirpes*, but, if there be no such descendants, the whole to go to the husband or widow, and, if there be no husband or widow, to the heirs according to the law regulating the distribution of intestate personal estate. Gen. St. 1902, § 399; Pub. Acts 1903, p. 149, c. 193. If the Act of Congress of April 22, 1908, applies to State courts, it would in an action under the Act by virtue of section 1, cut off grandchildren of the decedent in favor of his parents; and in the event of there being no surviving husband, widow, children, or parent, exclude the next of kin who were not dependent on the decedent. It would also remove any limitation of the damages recoverable in case of a fatal injury, and by the terms of section 6 double the time within which suit could be brought. By virtue of section 3 contributory negligence is to be no bar, but, if proved, "the damages shall be diminished by the jury," in a certain proportion. Under our practice, suits of such a nature have been often tried or heard in damages, before the court, without a jury. In such a case, unless the statute could be interpreted to require the court to allow such a diminution, the purpose of this section would be frustrated. Section 5 allows a set-off under certain circumstances. The action given is

one founded on a tortious act or omission for which the defendant is made responsible. Set-off is purely a matter of statute. It was unknown to the common law. Our statutes allow it in certain causes sounding in contract, but not in any sounding in tort. *Lovell v. Hammond*, 66 Conn. 500, 508, 34 Atl. 511. If the act of Congress can support an action brought under its provisions in a State court, it would force upon this State an extension of the privilege of set-off which our statutes have not thought it wise to permit. It would also, by virtue of section 6, double the time within which a railroad company can be asked in our courts by one of its servants for personal injuries received while in its employment. Under Gen. St. 1902, § 1130, no action to recover damages for an injury to, or the death of any person, caused by negligence, can be maintained against any railroad company, unless written notice, containing a general description of the injury, and of the time, place, and cause of its occurrence, as nearly as the same can be ascertained, shall have been given to the defendant within four months after the neglect complained of unless the action itself is commenced within that period. That such a notice has been given is a condition of recovery. *Peck v. Fair Haven & Westville R. Co.*, 77 Conn. 161, 58 Atl. 757.

No similar provision is made in the Act of Congress now in question, and, if it applies to proceedings in State courts, no such notice in cases brought under it would seem to be necessary. It is not alleged in the case at bar that one was given, though the action was not brought until more than four months after the alleged date of the plaintiff's injury. The question now under consideration is not whether Congress may not prescribe a new rule of right as to transactions occurring in the course of commerce between the States, to be recognized and to control the disposition of causes in all courts, State and Federal. Undoubtedly it can. *Schlemmer v. Buffalo Railway*, 205 U. S. 1, 27 Sup. Ct. 407. It would be a change in substantive law, and thus alter so far forth the law of the land. But the Superior Court was called upon to say whether the plaintiff could under the Act of Congress of 1908 insist on its entertaining an original action, which could only be brought, if at all, under the Act, and which could only be sustained by disregarding many of the requirements of our own law with respect both to pleading and evidence.

Another reason for considering this legislation as conversant only with proceedings in the Federal courts is afforded by the provision (section 7) that the term "common carrier," as used in the Act, "shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the

business of a common carrier." By this a direct action is unconditionally given on the statute against a receiver. Receivers stand for the court which appoints them. To sue them without leave of that court is contrary to the rules of chancery practice. By an Act of Congress passed March 3, 1887 (24 Stat. 552, c. 373), every receiver appointed by any court of the United States may be sued without its previous leave. The two Acts of 1908 and 1887, so far as they apply to Federal courts, are in this respect in entire harmony. But, if the Act of 1908 were to be construed as warranting an action in a State court against a receiver appointed by a State court, it would set up a new rule of practice for that State, and attack the dignity of its judicial department.

We have then a statute plainly intended to give an action in the courts of the United States, and assuming that it is not unconstitutional, well adapted to that purpose. It is a statute not expressly purporting to give an action in a court of a State, and which in this State at least is not in harmony with our system of administrative justice. If it gives such an action, it can only be on the ground that as its terms are general, and do not exclude State courts, a right to sue in them is implied. Undoubtedly the courts of every State and of the United States together constitute in a certain sense one judicial system for the enforcement of legal rights, but it is not to be presumed that Congress would (if it could) require those of a State to enforce rights newly created by the laws of the United States, which can only be enforced by following modes of procedure not permitted by the State law and opposed to the public policy which that law declares. *Claffin v. Houseman*, 93 U. S. 130, 136. Nothing short of express provisions or necessary implications in the language of an Act of Congress could suffice to force upon a State court the exercise of a jurisdiction so incompatible with the legislation and practice which constitutes its ordinary and natural rules of action.

It is true that under the present statutes of the United States no action under the Act of 1908 would lie in a court of the United States unless the damages claimed exceeded \$2,000. Congress may, however, well be deemed to have had in mind the power of the plaintiff to claim what damages he pleases, and the rule that the sum named determines the jurisdiction. But, if Congress intended to give an action under the Act of April 22, 1908, in the courts of the States, as well as in those of the United States, it is our opinion that the Superior Court was justified in sustaining the demurrer. The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long

before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Federation (article 4) and impliedly guaranteed of article 4, § 2 Const. U. S. as a privilege inherent in American citizenship. *Slaughterhouse Cases*, 16 Wall. 36, 75; *Gibbons v. Ogden*, 9 Wheat. 1, 211; *Crandall v. Nevada*, 6 Wall. 35; *Lottery Case*, 188 U. S. 321, 362, 23 Sup. Ct. 321; *The Employers' Liability Cases*, 207 U. S. 463, 502, 28 Sup. Ct. 141. The reserved powers of the State leave them charged with the sole duty and power of preserving public order and the security of persons and property within their territorial limits, except so far as, by or under the Constitution of the United States, it may be otherwise provided. A like duty and power exist with reference to the regulation of the private relations of employer and employee, and in general to the duties of common carriers. That a regulation so adopted by a State may incidentally affect commerce between the States does not render it invalid. *Hennington v. Georgia*, 163 U. S. 299, 317, 16 Sup. Ct. 1086; *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 17 Sup. Ct. 418; *Chicago Railway Co. v. Solan*, 169 U. S. 133, 137, 18 Sup. Ct. 289; *Missouri Railway Co. v. Haber*, 169 U. S. 613, 635, 18 Sup. Ct. 488.

The State of Connecticut has under her laws, written and unwritten, so regulated the relations of employer and employee that no action can be maintained in her courts by a servant against his master for personal injuries sustained within her territorial limits through the negligence of one of his fellow servants, nor for such injuries sustained through the negligence of the master, combined with that of the plaintiff himself, when the latter's negligence essentially contributed to the result, whether it were or were not as great as the master's. The servant of a common carrier falls within these rules. This is not because of the nature of his master's business. They apply to every servant and every master. If it be assumed that Congress has power to prescribe a different rule for accidents occurring in or outside of Connecticut in the course of running a railroad train between States, and to create a new statutory action for its enforcement cognizable by the courts of the United States it cannot in our opinion require such an action to be entertained by the courts of this State. It would open a door to serious miscarriage of justice through confusing our juries if one rule of procedure were to be prescribed in one class of suits against an employer and another, diametrically opposed to it, in another class of them. The same jurors might be instructed in one case that negligence on the part of the plaintiff constitutes no defense, but

might be considered in mitigation of damages, and in the next that he could not recover at all unless proved affirmatively that he met his injury when himself in the exercise of due care. They might be instructed in one case that a set-off was allowable, and in the next, under contractual conditions precisely similar, that a set-off was not allowable. It would also compel the courts established by a sovereign power, and maintained at its expense for the enforcement of what it deemed justice, to enforce what it deemed injustice. If Congress may thus change the common-law relations of master and servant by giving a new form and cause of action in the courts of the United States, it does not follow that they can give a servant a right to such a remedy in those of States where these relations remain unaltered.

The Act of 1908 furthermore, if constitutional, enlarged the judicial power of the courts of the United States by giving in a certain class of causes a judicial remedy where none previously existed. This remedy is by a plenary action. If we understand correctly the position of the Supreme Court of the United States, no part of the judicial power of the United States when it is to be exercised in the form of an original plenary action, can be vested in any court not created by the United States. In *Martin v. Hunter's Lessees*, 1 Wheat. 304, 330, it was stated that "Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself." *Houston v. Moore*, 5 Wheat. 1, 27, which reaffirmed this position, was the subject of consideration in *Clafin v. Houseman*, 93 U. S. 130, 141, where it was held to have decided "not that Congress could confer jurisdiction upon the State courts, but that these courts might exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts." *Robertson v. Baldwin*, 165 U. S. 275, 279, 17 Sup. Ct. 326, in words previously quoted, pronounces it as the better opinion that the Constitution was intended to confine to the courts created by Congress the trial and determination of cases in courts of record falling within the grant of Federal judicial power. This case does not present the question which might arise if the State of Connecticut by appropriate legislation had accepted for its courts the jurisdiction which the plaintiff invokes. If he could then maintain his suit, it would be because the State had in effect granted him the right to sue. *Ex parte Knowles*, 5 Cal. 300. But, if Congress may authorize a State court to entertain a plenary action created by a law of the United States, it would not follow that the jurisdiction must be assumed. The judicial duty of the

courts of a State is fulfilled when they administer justice as its laws require. *Stephens, Petitioner*, 4 Gray (Mass.), 559, 562. If they may, when not prohibited by the statutes of their State, accept jurisdiction of statutory actions given by Act of Congress, they are also free to decline it; and the objection may be taken by demurrer. *Ely v. Peck*, 7 Conn. 239.

The grounds of the demurrer filed in the case at bar, while challenging the constitutionality of the Act of 1908, do not specifically raise the point now under discussion. It was, however, manifest on the face of the record, and, the judgment that the complaint was insufficient being right, it is immaterial that this particular objection was not distinctly made. *Thresher v. Stonington Savings Bank*, 68 Conn. 201, 205, 36 Atl. 38; *British-American Ins. Co. v. Wilson*, 77 Conn. 559, 564, 60 Atl. 293.

Thus far we have refrained from discussing the constitutionality of the Act, except as to the single objection that, if it can be considered as intended to give an action in the courts of the States, it goes in that respect beyond the powers of Congress. In our opinion it also transcends them otherwise. By section 1 the rule of *respondeat superior* is extended so as to make the common carrier by railroad between States responsible for any injury received by one of its servants in the course of his employment in interstate commerce, due in whole or part to the negligence of any of its officers, agents, or employees, whether they are or are not at the time themselves employed in such commerce. An interstate carrier is generally also an intrastate carrier. It may have a considerable force of officers, agents, or employees engaged in business that is wholly local. Does the power to regulate commerce between the States go so far to warrant imposing on a carrier responsibility to a servant engaged in that business for the consequences of the negligence of another of its servants, occurring when the latter was not engaged in it, or indeed in any business for the common employer? If a freight clerk whose duties are confined to keeping tally of goods consigned from one point to another in the same State in an office devoted to that purpose should carelessly discharge a rifle, a bullet from which should hit a brakeman on an interstate train a mile away, we are of opinion that it could not fairly be deemed a regulation of interstate commerce to hold the common employer responsible for the injury. *The Employers' Liability Cases*, 207 U. S. 463, 498, 28 Sup. Ct. 141. Nor would it be such a regulation to make an interstate railroad company liable to a train hand who while going to work

was accidentally struck by an automobile directed by one of its vice-presidents or land agents while on a pleasure drive.

It is to be observed in this connection, also, that the Act is not concerned solely with cases of injuries to train hands. It includes those to any person who is employed by the carrier in interstate commerce, and gives an action to his "or her" personal representative. A waitress employed by an interstate railroad in a railroad restaurant, where local custom does not exist or is not served, could recover on the statute for an injury received from the negligence of a man hired by the carrier for some purpose purely of a local character. Except so far as the Act is a regulation of commerce between the States, its enactment was beyond the power of Congress. That it remotely affects such commerce is not sufficient, if that result is only to be secured by invading the settled limits of the sovereignty of the States with respect to their own internal police. *Williams v. Fear*, 179 U. S. 270, 278, 21 Sup. Ct. 128; *Keller v. United States*, 213 U. S. 138, 29 Sup. Ct. 470. The Act cannot be interpreted as referring only to negligence of employees while engaged in interstate commerce. It substantially re-enacts in this particular the words of the previous Employers' Liability Act of June 11, 1906, (34 Stat. 232, c. 3073), and must be presumed to have been drafted with knowledge of the judicial construction which those words had received. The Employers' Liability Cases, 207 U. S. 463, 500, 18 Sup. Ct. 141.

The provision of section 5 that any contract between an interstate carrier and any of its employees in such business intended to enable it to exempt itself from any liability created by the Act "shall to that extent be void" is in our opinion in violation of the fifth amendment of the Constitution of the United States as tending to deprive the parties to such a contract of their liberty and property without due process of law. The contract may be one made on a full consideration by an employee or one seeking to become such, who is fully capable of understanding its meaning and effect. He may be the general manager of a great railroad system, the damages resulting from the loss of whose life might justly be estimated at a vast sum. His salary may have been agreed on in view of this provision of exemption. To avoid that, and yet let the other provisions of the contract stand, would necessarily work rank injustice. It would virtually deprive the carrier of its property, and under the construction of that phrase adopted by the courts of the United States, do so without due process of law. *Adair v. United States*, 208 U. S. 161 172, 28 Sup. Ct. 227. The statute cannot be regarded in this respect

as one made for the protection of an ignorant and improvident class, such as the Acts regarding shipping articles. The employees of a railroad company are in general men of more than ordinary intelligence. The dangerous nature of the business requires and secures this. It cannot be regarded as one made for the protection of train hands, for it covers every kind of employee. It denies them one and all that liberty of contract which the Constitution of the United States secures to every person within their jurisdiction. The Act, it is to be remembered, does not confine itself to avoiding the contractual provision for exemption from liability for the negligence of the carrier's servants while engaged in carrying on the work of transportation. It avoids a provision for exemption from liability for the negligence of its servants while not engaged in carrying on the work of transportation, and even while not engaged in the line of their service, at all. The provisions of section 3 allow and apparently require the recovery of some damages, although the plaintiff's negligence was gross, and that of his fellow employee slight. If, as aptly suggested by the defendant's counsel, an engineer, hearing but negligently disregarding an automatic warning bell, should derail his train at a switch negligently left open by the man in charge, and the latter be struck by an overturned car, each could recover from the common employer for any personal injury, although it came from a plain violation of known rules, and the employer's loss from the consequent destruction of life and property were enormous. The doctrine of comparative negligence, as it has been generally understood where it obtains, is that slight negligence shall not defeat an action against one guilty of gross negligence. In the form assumed by the Act of 1908 it sanctions a recovery where the plaintiff has been guilty of gross negligence and the defendant of none at all. To hold the carrier liable in such case because of the imputed negligence of any officer, agent, or employee, whether the latter be at the time engaged in interstate commerce or not, seems to us not an appropriate or legitimate regulation of commerce between the States, but rather an arbitrary and unlawful deprivation of property within the meaning of the fifth amendment to the Constitution of the United States. It serves to confirm this conclusion that the liability thrown upon the carrier by section 1 is not confined to damages resulting solely from the negligence of its officers, agents, or employees. It is fixed and complete if such negligence contributes in any degree to the injury, although it be partly due to the act or omission of a mere stranger. There can be no contribution between wrongdoers. If therefore, the carrier in such a case could be held

under the statute, his property would be taken to pay for a wrong mainly, perhaps, done by one with whom it stood in no contractual relations, and who, except for this particular act, had no connection with commerce between the States. The Act gives a remedy for injuries causing death, without limitation of the damages recoverable, in favor of the executor or administrator, the fund to be distributed in a manner which is inconsistent with the law of every State with respect to the devolution of the estate of a deceased person. In our opinion, Congress cannot create such a right of action in favor of personal representatives of an inhabitant of a State. They are appointed, or their appointment is approved, by authority of the State, exercised through some court to which they are accountable. If the damages recoverable are to be treated as representing estate left by the decedent, it is for the State of his domicile to regulate their distribution. If they are to be treated as a fund created by this Act, which does not represent anything that ever belonged to the decedent, it was in our opinion not within the competency of Congress thus to bring into exercise a new duty of executors or administrators to collect and a new duty of masters to pay what the decedent never owned. Such legislation falls solely within the sphere of the State. It does not appear that Congress would have enacted this measure without the provisions on which we have thus commented. These parts of the statute cannot be severed from the rest and their invalidity renders it wholly void, so far as it applies to the case before us. *The Employers' Liability Cases*, 207 U. S. 463, 501, 28 Sup. Ct. 141.

A statute enacted in a jurisdiction where a written constitution obtains is *prima facie* presumed by its courts if its validity be questioned before them to be in accord with that constitution. Whether such a presumption exists, either in a State court or in those of the United States, in favor of an Act of Congress which, if valid, reduces the limits within which the sovereignty of the States has for more than a century been freely exercised, and especially of this Act, which by its title does not purport to be a regulation of interstate or foreign commerce, but simply to relate "to the liability of common carriers by railroad to their employees in certain cases," we need not inquire. If the statute under review has the support of such a presumption, that support is overthrown by the consideration previously stated.

To sum up our conclusions, the judgment of the Superior Court was right on each of the following grounds: 1. Congress did not intend by the Act of April 22, 1908, to authorize the institution of an

action under it in the courts of the State. 2. It had no power to make it incumbent on the State courts to assume jurisdiction of such an action. 3. The issue before the Superior Court involved the consideration of these points, which justified of themselves the dismissal of the plaintiff's action; but, further, 4, the Act, so far as it concerns this cause is wholly void by reason of certain of its provisions which cannot be separated from the rest.

There is no error. The other Judges concur.

WILMINGTON CITY RAILWAY COMPANY V. TRUMAN ET AL.

Supreme Court, Delaware, January, 1909.

PEDESTRIAN STRUCK BY STREET CAR AT CROSSING— NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE— QUESTIONS FOR JURY.— In an action for damages for injuries to plaintiff's intestate caused by being struck by defendant's street car while he was at a street crossing, the questions whether the injured person was guilty of contributory negligence in stepping back in front of the car, after he had crossed the track, to allow a team to pass, and whether the motorman, who had slackened speed on seeing him crossing the street, was negligent in increasing the speed when the pedestrian had barely cleared the track, were for the jury.

RAILROAD CROSSING— DUTY OF PEDESTRIANS— LOOKING FOR CARS.— A person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If, as he attempts to cross the track, his line of vision is unobstructed, he is bound to look for approaching cars in time to avoid collision, and if he does not look, and for that reason does not see an approaching car until it is too late to avoid the collision he is guilty of negligence and cannot recover (1).

STREET RAILROAD— PERSON ON TRACK STRUCK BY CAR— CONTRIBUTORY NEGLIGENCE.— If a person moves from a position of safety to a position of danger, near or upon the tracks upon which a street car is running, so suddenly as to make it impossible for the motorman to stop the car before the collision, the railroad company cannot be held liable for the resultant injury.

1. For actions relating to accidents at crossings, both Steam and Street Railroad cases, from 1897 to 1909, see Vols. 1-21 AM. NEG. REP.

See also AMERICAN NEGLIGENCE DIGEST (1909 edition), where the

cases reported in Vols. 1-20 AM. NEG. REP. (from 1897 to 1907) are classified under the respective titles of COLLISIONS, CROSSINGS, RAILROAD COMPANY, STREET RAILROADS, etc.

STREET RAILROAD—PERSON ON TRACK—DUTY OF MOTORMAN.—If the motorman of a street car sees, or by the exercise of reasonable care could have seen the person injured in a position of danger upon the track, it is his duty to do everything that a reasonably careful and prudent man would do under like circumstances to avoid the accident. If he fails to perform this duty and injury results therefrom, he is guilty of negligence.

INSTRUCTIONS—PREPONDERANCE AND WEIGHT OF EVIDENCE.—An instruction that : "In civil cases the determination of the jury should be in favor of that party for whom is the preponderance or greater weight of the evidence," without explaining what was meant by "preponderance" or "greater weight," was a correct statement of the law, and it could not be assumed that the jury did not understand it or that they inferred that the terms meant the number of witnesses.

ERROR to Superior Court, New Castle County.

ACTION by Philip Lynch against the Wilmington City Railway Company. Plaintiff having died, Ellen J. Truman and another, executrices, were made parties plaintiff. There was a judgment in their favor, from which defendant brings error. The facts are stated in the opinion. *Judgment affirmed.*

ARGUED before NICHOLSON, CH., LORE, C. J., and GRUBB and PENNEWILL, JJ.

WALTER H. HAYES and ANDREW C. GRAY, for plaintiff in error.

EDWIN R. COCHRAN, JR., and SYLVESTER D. TOWNSEND, JR., for defendants in error.

PENNEWILL, J. — This action was brought in the court below by Philip Lynch in his lifetime to recover damages for personal injuries alleged to have been caused by the negligence of the plaintiff in error. Subsequently Philip Lynch died, and letters of administration were granted on his estate to the defendants in error, who were made parties plaintiff in the action. Plaintiff below in the trial of the cause relied entirely on the allegations of negligence contained in the first and second counts of the declaration.

In the first count it is averred that on the 30th day of April, 1906, in the city of Wilmington, the defendant company negligently and carelessly ran and operated a certain car propelled by electricity over and along certain railway tracks, and through a portion of said city, at a speed greater than it was authorized to do by law, to wit, at a speed of upwards of seven miles an hour, and thereby and by means of the negligence and carelessness aforesaid the said electric car ran into and over the said Philip Lynch while he was lawfully crossing said railway tracks on Maryland avenue, near Chandler street, in

said city. In the second count it is alleged that the said Philip Lynch was lawfully upon or crossing the tracks of the defendant company at a public crossing on Maryland avenue, at or near Chandler street, and that the said defendant then and there negligently and carelessly failed to properly warn the said Philip Lynch of the approach and movement of the car by gong, bell, or otherwise, and otherwise negligently and carelessly operated the said car that by and through the negligence and carelessness aforesaid the car was violently driven and struck the said Philip Lynch.

The negligence relied upon by the plaintiffs below, therefore, was first, excessive and unlawful speed; and, second, failure to warn the deceased of the approach of the car. The testimony as to both the speed of the car and the ringing of the bell, at and just before the time of the accident, was conflicting. There was evidence on the part of the plaintiffs showing that the car was being run at a speed of from eight to ten miles an hour and that the bell did not ring, while witnesses for the defendant testified that the speed of the car did not exceed five or six miles an hour and that the bell did ring. The plaintiff in error, however, claims that it is immaterial what may have been the speed of the car, or whether any notice of its approach was given by bell or otherwise, because there was no evidence submitted which tended to show that either the speed of the car or the failure to ring the bell was the cause of the accident, or contributed in any wise thereto. It is insisted that the court below should have directed the jury to return a verdict in favor of the defendant.

The principal question raised by the assignment of error, and to be determined by this court, is whether the court below erred in refusing to so direct the jury. In order to determine this question it will be necessary to review the evidence submitted at the trial. There were but two witnesses who saw the accident, and one of these, testifying for the plaintiffs, said the right-hand corner of the car struck his father, and that the first he saw of his father or the car was at the instant of the collision. The other witness was the motorman who was operating the car. His testimony was substantially as follows: "As I approached Chandler street, I noticed, probably a square from Chandler street, a team coming down on the other track, coming in town. As I got within, I guess, one-third of a square, or three or four car lengths, or something like that, from the wagon, as I always do, I rang the bell to keep the team from turning in towards the front of the car. I got my car under control, tightened up on the brakes, and brought it down to a reason-

able speed. As I got a couple more car lengths towards Chandler street I saw a man walk out from behind the wagon and begin to walk across the street, and I commenced to slow down the car. I should say the car was then about two or probably three, car lengths from him, he was going across the track in a westerly direction, and when he was eighteen inches or two feet clear of the track, so that the car would have cleared him if he had stayed there, I released the brake a little and started to continue past him. When I got within, — well, the fender was a few feet from him, the man glanced around. He looked in town then, north, I guess, and saw a team about the back end of the car going in the same direction that I was, not on the tracks, but on the outside of the track, and on the west side of Maryland avenue, between the track and the curb. He looked towards the team, and stepped back within about six or eight inches of the rail, and the horse's head was then about a car length from him. When he gave the step back the front of the car was distant from him a little more than the distance from the front of the fender to the body of the car. I then did everything in my power. I put on the brakes just as hard as I possibly could, and rang the bell from the time I first saw him until he was struck by the car. When the man stepped about eighteen inches or two feet clear of or over the track, I thought I could clear him and went on. The part of the car that struck him was the right-hand rail in the dashboard of the car. The reason I loosened up my brakes was because I thought the man would either stay where he was or keep across the street. I thought that a man who was looking right at the car like he was would not step directly back in front of the car. I judged that he was sensible enough to be on the street, and had sense enough to keep on across the street."

The important and vital question seems to be this: When the motorman plainly saw the deceased crossing the tracks two or three car lengths in front of him, and had taken the precaution to tighten his brakes, slow down the car, and get it under control, was it negligence on his part to loosen his brakes and continue at a greater speed, when the deceased had barely cleared the tracks and stopped? It appears from the testimony of the motorman that the side of the car extended over the track about six or eight inches, so we may assume that, if the deceased had remained where he stopped, the car could not have cleared him more than about twelve inches. Could it have been said, therefore, by the court below, that he was practically in a position of safety when the motorman increased the speed of the car? It is true the testimony discloses that there was a

clear and unobstructed view of the approaching car from the place where Lynch stood, that he was familiar with the crossing, and was looking in the direction of the car as it came towards him. And it is unquestioned law in this State that a person approaching a railway crossing with which he is familiar is bound to avail himself of his knowledge of the locality and act accordingly. If, as he attempts to cross the tracks, his line of vision is unobstructed, he is bound to look for approaching cars in time to avoid collision; and if he does not look, and for that reason does not see an approaching car until it is too late to avoid the collision he is guilty of negligence and cannot recover. It is also a well-settled principle of law that, if a person moves from a position of safety to a position of danger, near or upon the tracks upon which a car is running, so suddenly as to make it impossible for the motorman to stop the car before the collision, the company cannot be held liable for the resultant injury. But there is another principle of law equally well settled in this State, which is that if the motorman sees, or by the exercise of reasonable care could have seen, the person injured in a position of danger upon the track, it is his duty to do everything that a reasonably careful and prudent man would do under like circumstances to avoid the accident. If he fails to perform this duty, and injury results therefrom, he is guilty of negligence. In other words, even though a person be negligently upon the tracks, a motorman may not run him down, but must do all that he reasonably can do to avoid injuring him.

Applying these principles to the present case, the crucial question to be determined, in the light of the testimony adduced, is whether Lynch was in a position of safety or danger at the time the motorman loosened his brakes and ran his car towards him at a rate of speed which some of the witnesses testified was as great as eight or ten miles an hour. It cannot be said to be clearly a case where the deceased, being in a position of safety, so suddenly placed himself in the way of a car as to make it impossible for the motorman to avoid the accident. The motorman admits that he saw him upon the tracks, and held his car at a very low rate of speed until he thought that the danger was passed. But was the danger passed, and had the motorman a right to assume that he could safely pass Lynch while standing so near the track, watching a team that was approaching? The motorman testified that Lynch had stopped and was looking at the team, which was moving along with the car. We do not say that the motorman was negligent in running his car as he did at the time of the accident. Neither do we say the deceased was

not negligent when he made the step backward toward the track. But we are clearly of the opinion that it was a question for the jury to determine, under all the facts, conditions, and circumstances existing at the time and disclosed by the testimony, whether the motorman was negligent, and, if he was, whether the defendant was released from liability on account of contributory negligence on the part of the deceased.

It is also assigned as error that the court instructed the jury as follows: "In civil cases the determination of the jury should be in favor of that party for whom is the preponderance or greater weight of the evidence" — without explaining what was meant by the "preponderance" or "greater weight" of the evidence. It is argued by the plaintiff in error that such an instruction, unexplained, might have led the jury to infer that the "preponderance" or "greater weight" of the evidence might mean the number of witnesses. But little reliance, we think, was placed upon this point in the argument, and, indeed, it was admitted that it would be impossible to say whether the jury drew such an inference. The instruction given by the court was a correct statement of the law, couched in the language usually employed in charging the jury in such cases, and the record does not show that there was any request by the defendant company to explain the meaning of the words referred to; and, moreover, it is manifest that this court cannot assume that the jury did not understand the court's instruction.

We find no error in the record of the proceedings below, and the judgment of the court is therefore affirmed.

SEABOARD AIR LINE RAILWAY COMPANY v. THOMPSON.

Supreme Court, Florida, Division B., February, 1909.

CARRIER OF PASSENGERS—PERSONAL INJURIES—PRESUMPTION OF NEGLIGENCE—PASSENGER INJURED BY WINDOW OF CAR.—The presumption of negligence cast upon railroads by our statute in personal injury cases ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such

a presumption as will outweigh proofs or that will require any greater or stronger or more convincing proofs to remove it. All that the statute does in creating the presumption is thereby to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends. And when, in a suit for personal injury, the railroad company proves affirmatively by undisputed and uncontradicted evidence that it and its agents exercised all ordinary and reasonable care and diligence, and were not guilty of the negligence alleged, the plaintiff has no right to recover.

(*Syllabus by the Court.*)

Applied, in an action by plaintiff, a passenger on one of defendant's trains, for injuries sustained by the fall of an alleged defective window in the car in which plaintiff was riding (1).

ERROR to Circuit Court, Baker County.

ACTION by Joe Thompson, by his next friend, A. C. Budamire, against the Seaboard Air Line Railway Company. From a judgment for plaintiff for \$500, defendant brings error. The facts appear in the opinion. *Judgment reversed.*

GEO. P. RANEY, for plaintiff in error.

KELLEY & CONE, for defendant in error.

TAYLOR, J. — The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the Circuit Court of Baker County in an action for damages for personal injuries. The trial resulted in a verdict and judgment for \$500, and this judgment the defendant below brings here for review by writ of error.

At the close of the evidence, the defendant moved the court for a peremptory charge to the jury to find for the defendant. This request was denied, and such ruling is assigned as error. This was error. The declaration in the case alleged that the plaintiff was a passenger on one of defendant's trains, and that while he was such passenger the defendant did not use due and proper care that he should be safely carried, but wholly neglected so to do, and then and there carelessly and negligently permitted and suffered a defective window to remain and be in said car at the seat where the plaintiff was sitting on said train, and also allowed the defective window to be raised, and, while the said plaintiff was sitting in said car, the said window, being defective, as aforesaid, fell on one of the plaintiff's hands with great force, which said hand was caught in and under

1. For a general classification of similar accidents as that in the case at bar, see the AMERICAN NEGLIGENCE DIGEST (1909 edition) under the title "Carrier of Passengers," where the cases reported in Vols. 1-20 AM. NEG. REP. (covering the period from 1897 to 1907) are collated.

said window, and which said window thereby crushed, bruised, and mangled the said hand and fingers of the plaintiff, which caused him much pain and suffering, and caused him to have fever, and to become sick, sore, crippled, and disordered for about two months.

The only negligence alleged against the defendant was that it permitted a defective window to be and remain in the car where plaintiff was riding as a passenger, and negligently allowed said defective window to be raised and that, by reason of such defective window, the injury resulted to plaintiff. When we come to the proofs, there is not a scintilla of testimony tending to show that there was any defect in the window that caused the injury to the plaintiff, save the bare fact that such window fell and caught the plaintiff's hand. Several witnesses for the defendant testified, on the contrary, that said window was carefully inspected, one of them inspecting it immediately after the accident to the plaintiff, and that it and its fastening were in perfect condition. There was nothing to contradict or question this proof for the defendant. The plaintiff planted his right to recover on the alleged negligence of the defendant in having a defective window in its car. There was no proof to establish such negligence, but an abundance of un rebutted and undisputed proof that there existed no such negligence as alleged, but, on the contrary, that the window and its fastenings were in perfect condition. Addressing itself to the extent of the presumption of negligence cast by our statute against railroads in such cases, this court in *Atlantic Coast Line R. R. Co. v. Crosby*, 53 Fla. 400, 43 So. Rep. 318, said: "This presumption ceases when the railroad company has made it appear that its agents have exercised all ordinary and reasonable care and diligence. In the presence of such proof by the railroad company, the jury do not take any such presumption with them to the jury room in weighing the evidence and in coming to a determination. The statute does not create such a presumption as will outweigh proofs or that will require any greater or stronger or more convincing proofs than any other question at issue. All that the statute does is to cast upon the railroad company the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and here the statutory presumption ends." As before stated, the defendant railroad by an abundance of undisputed and uncontradicted evidence relieved itself of such presumption in this case, and there was no proof to establish the alleged negligence upon which the plaintiff relied for recovery, but, on the contrary, much uncontradicted affirmative proof that no such negligence existed as was alleged. Under these circumstances, the

plaintiff had no right to recover, and, at the close of the evidence, the court should have given the affirmative charge requested by the defendant.

The defendant also moved for new trial upon the ground that the verdict was not sustained by the evidence which motion was overruled, and it is assigned as error. It follows from what has already been said that this ground of the motion for new trial was well taken, and that the court erred in overruling such motion.

The judgment of the court below in said cause is hereby reversed at the cost of the defendant in error.

HOCKER and PARKHILL, JJ., concur.

WHITEFIELD, CH. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.

CENTRAL OF GEORGIA RAILWAY COMPANY V. MOORE.

Court of Appeals, Georgia, February, 1909.

1. PLEADING CONSTRUED — NEGLIGENCE — WILFUL AND WANTON ACTS.—The petition is construed as presenting an action based, not on negligence, but on wilful and wanton acts of the defendant's engineer.
2. CONTRIBUTORY NEGLIGENCE NOT A DEFENSE TO WANTON ACTS OF DEFENDANT.—Contributory negligence is not a defense to an action based solely on wilful and wanton acts of defendant by which he has recklessly or intentionally injured the plaintiff.
3. CHARACTER OF PLAINTIFF — WITNESS — DAMAGES.—The fact that one suing for a diminution of his earning capacity, through an injury occasioned by the defendant, was previously to the time he was injured a tramp is material, not only on the question of his credibility as a witness, but also in measuring his damages.
4. PERSON SITTING ON TRACK STRUCK BY TRAIN — WANTON NEGLIGENCE.—The case turns solely upon the question as to whether the plaintiff's injuries were inflicted by the defendant's agents wilfully and wantonly, and this issue should be presented to the jury unconfused with other issues (1).

(Syllabus by the Court.)

1. For actions similar to the case at bar, decided in the several States from 1897 to 1907, see Vols. 1-20 AM. NEG. REP.

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See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) where the cases relating to persons injured on track either while asleep or intoxi-

ERROR from City Court of Albany.

ACTION by W. H. Moore, alias W. H. Strawhand, against the Central of Georgia Railway Company. From judgment for plaintiff, defendant brings error. The case is stated in the opinion. *Judgment reversed.*

CRUGER WESTBROOK and WOOTEN & HOPMAYER, for plaintiff in error.

J. C. SMITH, W. R. SMITH, R. A. HENDRICKS, J. H. HALL, and HENDRICKS, SMITH and CHRISTIAN, for defendant in error.

POWELL, J. — Moore, alias Strawhand, recovered a verdict against the railway company in a suit for personal injuries, and to the overruling of a motion for a new trial the latter excepts. The trial was lengthy, and the record is voluminous. Indeed, we find that a great deal of surplusage has been lugged in. The plaintiff's action was brought, not on account of the defendant's negligence, but because the defendant inflicted a wilful and wanton injury upon him. The petition clearly discloses this: It alleges that the plaintiff was en route from Jacksonville, Fla., to Macon, Ga.; that at Albany he stopped over for a few days; that he met a party of friends, and took a few drinks of whisky; that he decided to take a walk out westward for Albany along the tracks of the defendant company; that, when he was about two miles out of the city, he felt weak, being at the time ill with chills and fever, and, having taken a few drinks and suddenly becoming faint, sat down on the end of one of the cross-ties, and while sitting thus lost consciousness, and while he was in this condition a passenger train came along, hit and severely injured him. It is alleged that approaching this point the track is straight for twenty-five miles. The particular wrongful act by which the defendant is charged with liability is alleged as follows: "Notwithstanding the brightness of the day, and that there were no obstructions whatever upon the track of the defendant, and that it was straight and the train was going upgrade, and the engineer of the defendant company saw the plaintiff at ample distance to have checked and stopped the same perfectly still many hundred yards before he reached defendant and seeing that your petitioner by reason of his condition as above set forth was off his guard, and not conscious of the approaching danger, that he wilfully and wantonly allowed the engine to run at the high speed of sixty miles

cated or sitting on track or platform of station, are collated under the titles CARRIER OF PASSENGERS (Asleep

at Station); ASLEEP ON TRACK; COLLISIONS; INTOXICATION; RAILROAD COMPANY; TRACK.

per hour until within a few feet of your petitioner, when he gave one blast of the whistle, but did not reverse his engine, or check his speed, notwithstanding your petitioner did not hear the blast of the whistle, and when it was blown remained in a perfectly motionless condition, and in the condition and position above described and set forth the said engineer permitted his train, without any efforts on his part, to collide with your petitioner with such force as to whirl him thirty feet from the place where he was sitting, and inflict upon him the injuries hereinafter set forth."

Nowhere in the petition is mere negligence charged. Throughout the whole of it the defendant's acts are characterized as "wilful and wanton." While a petition will be construed by the particular acts alleged, and not by the characterization put upon them by the pleader (see *Seaboard Air Line Railway v. Shigg*, 117 Ga. 454, 13 Am. Neg. Rep. 503, 43 S. E. 706), it is nevertheless perfectly patent from an examination of the whole petition in the present case that the action is based not on negligence of the defendant, but solely on its wilful and wanton conduct alleged in the language quoted above. It is true that by an amendment to the petition the plaintiff set out that the public, with the knowledge of the defendant, were accustomed to walk along the track of the company at the point where the injury occurred, and that there was a much-used private crossing near by, but no negligence growing out of these facts is set up. These things might have been material if the contention had been that the defendant's agent ought to have anticipated the presence of the plaintiff, but the allegation is direct and unequivocal that the engineer in charge of the train did, in fact, see the plaintiff sitting on the cross-tie. Under the evidence, the question whether it was a wilful and wanton injury was equally sole and dominant. The engineer admitted seeing the man on the cross-ties in plenty of time to have stopped the train if he had not expected him to get off voluntarily. The plaintiff's own statements as to his intoxication are so equivocal as to amount practically to an admission of the fact, and all the circumstances demand a finding that he was guilty of contributory negligence. In fine, under neither the pleading nor the evidence should the plaintiff have recovered unless a wilful and wanton injury appeared. Hence all the pleading and all the evidence which bore only upon the question as to whether the defendant's agent ought to have anticipated the plaintiff's presence were surplusage and immaterial to the issue.

2. Complaint is made that the court charged the jury that, if the plaintiff was injured by "wilful and wanton negligence" of the

defendant (we disapprove the use of the expression, for wilfulness and wantonness are so far the opposite of negligence as to make the expression 'wilful and wanton negligence' misleading, though it is frequently employed by many of our best jurists and law writers) he would be entitled to recover irrespective of whether he was guilty of contributory negligence or not. We understand this to be the law. It is so stated in practically all the text-books on the subject, and is fully recognized by the Supreme Court of this State and by this court. See *Shearm. & Redf. on Negligence*, § 64, 100, 483; *Thompson on Negligence*, § 206; *Central R. Co. v. Newman*, 94 Ga. 560, 21 S. E. 219; *Central R. Co. v. Denson*, 84 Ga. 774, 11 S. E. 1039. The liability is a harsh one, but it is just where the facts of the case warrant it. The court in charging the jury upon the subject should make it plain that it is never applicable unless the defendant's conduct was such as to evince a wilful intention to inflict the injury or else was so reckless or so charged with indifference to the consequences where human life or limb was involved as to justify the jury in finding a wantonness equivalent in spirit to actual intent. It is not the doctrine that is harsh or unjust, but only the liability of its being misapplied that makes it seem so.

3. The defendant sought to show by cross-examination of the plaintiff and otherwise that he had no fixed or regular employment, that for several months prior to his injury he had been traveling about from place to place and from State to State without any occupation — in short, that he was a common tramp. Exception is taken to the following charge of the court, given in connection with instructions to the jury on the subject of the measure of damages: "Right here I deem it proper to call to your attention that there has been some testimony introduced before you as to the previous work that the plaintiff in this case may or may not have done, as to his movements prior to the trial of this case in various States, as to what he did, or did not do there. Some remarks have been made in argument before the jury as to the plaintiff being a tramp. I charge you that all these things should not be considered by you in any other way than that you may consider all the evidence as affecting the credibility of the plaintiff as a witness. If you believe it does affect it more or less you have a right to consider it as bearing upon the point, and as that might bear upon the question of his capacity to labor and earn money; but if you believe under the law and evidence in this case, of course, that this plaintiff is entitled to recover, it would not matter whether he is a tramp or not; as to what his previous character may or may not have been. The only bearing

that the evidence introduced before you should have is as affecting the credibility of the witness; but, if you believe that he is entitled to recover, as I said before, under the law and evidence of the case, his character could not affect it at all. He would be entitled to recover just as much if he were a tramp as if he were a man a great deal different." This, of course, was an erroneous instruction, and we are of the opinion that it likely did the defendant great prejudice. Comparing this extract with the rest of the magnificent and comprehensive charge of the court, we are sure — and we would be so even if we were not also personally acquainted with the unusual ability of the trial judge — that the court did not mean to convey the impression which the language palpably conveys. What the court was trying to impress upon the jury was that, if the plaintiff had suffered a wrong at the hands of the defendant, he was entitled to have that wrong properly redressed, though he were a tramp no less than if he were a man of wholly different character. What he said was that he would be "entitled to recover just as much if he were a tramp as if he were a man a great deal different." Frequently we disregard slips of the tongue on the ground that under the context they could not naturally mislead the jury. In the present case an examination of the context does not relieve the error; indeed, by an inspection of another portion of the record, we find that there had been a colloquy between the court and counsel upon this very subject, and what is there reported tends to emphasize the injury to the defendant.

4. There are many other assignments of error in the record, but we need not discuss them or pass upon them. In the light of our view of the evidence and our opinion that there ought to be a new trial in the case, the other questions presented are immaterial. The plaintiff's right of recovery turns solely on the question as to whether the defendant's engineer acted wilfully and wantonly — that is, to say, in intentional or reckless disregard of human life — by not giving any warning and by allowing the engine to run on and strike the plaintiff whom he saw sitting in his intoxicated condition (for clearly he was intoxicated), helpless on the cross-tie, in the way of the rapidly moving train. If the defendant's engineer did this, if he acted in this spirit and not in simple carelessness or bad judgment, the plaintiff ought to recover such damages as he can legally show to the satisfaction of the jury; otherwise, he ought not to recover at all. On the next trial the issues ought to be much simplified; indeed, one of the considerations impelling us to reverse the judg-

ment now is that we feel that the jury were probably confused by the large number of immaterial matters that were presented for their consideration on the former trial.

Judgment reversed.

HOLLOWAY v. MACON GASLIGHT & WATER COMPANY.

Supreme Court, Georgia, 1909.

WATER COMPANIES — FAILURE TO SUPPLY WATER — LIABILITY FOR LOSS BY FIRE. — A waterworks company, operating under a franchise which gives to it the right to use the streets, etc., of a city for the purpose of laying its mains, etc., and carrying on its business, and which enters into a contract with the municipality to supply it, in its corporate capacity, with a sufficient supply of water from the city hydrants to extinguish fires, and to furnish private consumers, at fixed tolls, with water for domestic and manufacturing purposes, is under no public duty to a resident of the city to furnish the municipality with water to protect his property from loss by fire, and consequently cannot be held liable to him, in an action of tort, for fire loss sustained by him by reason of its failure to supply the city with water with which to extinguish the fire which consumed his property (1).

(Syllabus by the Court.)

1. *Liability of waterworks companies for damage caused by fire.* — For actions arising out of the liability of waterworks companies for similar accidents as in the case at bar, see the title "WATER COMPANY" in the AMERICAN NEGLIGENCE DIGEST (1909 edition), where the cases from 1897 to 1907 are collated. See also the title of "FIRE" in the same Digest.

See also the following cases decided in *Florida, Maine, and South Carolina*:

In *WOODBURY v. TAMPA WATERWORKS Co.*, (*Florida*, February, 1909) 49 So. Rep. 556, plaintiff brought an action in the Circuit Court, Hillsborough County, to recover damages from the defendant company

for the burning of a house in the city of Tampa, alleged to have been caused by the negligence of the defendant in not furnishing water for fire protection under a contract with the city involving the use of franchises. Judgment was entered for defendant. Plaintiff appealed.

Judgment affirmed. Among the points decided by the Supreme Court (per WHITFIELD, CH. J.), were the following (as stated in the syllabus to the report in 49 Southern Rep.):

"Where a water company undertakes to render the public service of furnishing water for fire protection in a city, an individual may maintain an action against the company to recover damages for a

Case certified from Court of Appeals.

ACTION by J. D. Holloway against the Macon Gaslight & Water Company. Judgment for defendant, and plaintiff brings error to the Court of Appeals, which certified the case to the Supreme Court. *Judgment rendered.*

"The question in this case was certified to this court by order of the Court of Appeals, which is as follows:

"J. D. Holloway *v.* Macon Gaslight & Water Company.

"In the foregoing case, pending in the Court of Appeals, said court desires the instruction and decision of the Supreme Court as to the following question of law necessary to the proper determination thereof, to wit: Does the petition set out a good cause of action

loss proximately resulting to him from the negligent failure of the company to perform its duty to the plaintiff as a part of the public service undertaken, if the loss is such as the company should reasonably have contemplated as the ordinary, natural, and probable result of the negligence.

"The duty a water company owes by implication of law to an individual property owner by virtue of engaging in the public service of furnishing water for fire protection is to supply the hydrants near the property of the individual with water as legally required. The law imposes no duty to insure property or to extinguish fires.

"Where a water company is engaged in rendering the public service of furnishing water for fire protection in a city, and an action for negligence is brought against the company by an individual, an allegation that the negligence consisted in the failure of the company to supply the hydrants in the immediate section where the fire existed with water for fire purposes, and by reason thereof the fire was not extinguished, and then and there spread to and burned the

plaintiff's property, does not show that the negligence complained of was a proximate cause of the plaintiff's loss, where it appears that the plaintiff's property was not located where the fire originated and 'existed,' and it does not appear that the defendant was responsible for starting the fire, or was under a duty to extinguish the fire and failed to do so. The negligence of the defendant in failing to furnish water where the fire originated may not be the proximate cause of the burning of property at another place, and the duty of the defendant to the plaintiff is to furnish water at the point where the plaintiff's property is located, not where property of others is burning."

On motion for rehearing the same was denied (May 18, 1909), the court discussing at length the questions involving the liability of public corporations and citing many authorities thereon.

In *HONE ET AL. V. PRESQUE ISLE WATER COMPANY*, (*Maine*, June, 1908) 71 Atl. 770, on plaintiff's exceptions to sustaining of demurrer in action on the case brought by plaintiff against defendant to recover damages for the loss of cer-

which alleges: That the defendant is the Macon Gaslight & Water Company, which is a public service corporation engaged in furnishing water to the city of Macon and to the inhabitants of that city for toll, and which has a monopoly of such business in said city. That the city itself and the inhabitants thereof are now and for the past four years have been utterly and entirely dependent on the defendant for water supply. That on November 26, 1891, the defendant entered into a contract with the city of Macon respecting the furnishing of water to said city for a period of twenty years, which has not expired. (A copy of said contract, omitting certain immaterial parts, is hereto attached as a part hereof and marked 'Exhibit A.')

That by the terms of said contract the defendant agreed to furnish water to said city for its benefit and for the benefit of its inhabitants for fire

tain buildings owned by them and destroyed by fire, caused by alleged negligent failure of defendant to keep a certain hydrant in proper repair and condition for use, the exceptions were overruled and demurrer sustained, the declaration being adjudged insufficient. The opinion was rendered by WHITEHOUSE, J., and numerous cases were cited in support of the decision. The official syllabus states the facts and points as follows:

(1) A demurrer only admits such facts as are well pleaded in the declaration.

(2) A demurrer does not confess a matter of law deduced by either party from the facts pleaded.

(3) In a declaration, an allegation of duty alone is not sufficient. There must be an allegation of facts sufficient to create the duty; otherwise the declaration will be defective. [Citing *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24].

(4) Negligence which consists merely in the breach of a contract will not afford ground for an action by one who is not a party to the contract, and not a person for

whose benefit the contract was avowedly made.

(5) A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act; and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen.

(6) Although a municipal corporation maintaining a fire department levies and collects a tax to pay a water company for water furnished under a contract between the corporation and the water company for the use of such fire department, yet that fact does not create any privity of interest between the water company and a citizen or a resident or a taxpayer of the corporation. [Citing *Mott v. Water Co.*, 48 Kan. 12, 28 Pac. 989; *Beck v. Kitanning Water Co.*, (Penn.) 11 Atl. 300; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, and other Iowa cases; *Howsmon v. Trenton Water Co.*, 110 Mo. 304, 24 S. W. 784; *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S. E. 673; *House v. Houston Waterworks Co.*,

protection and for other purposes, it having therein been agreed by the defendant as follows: 'The party of the second part (the defendant herein mentioned) agrees to supply the party of the first part (the mayor and council of the city of Macon), with water in sufficient quantities and at all times for fire protection.' That the city of Macon has continuously paid the defendant, from revenues derived from the taxation of its citizens, for the services so contracted to be performed by the defendant. That on November 19, 1907, petitioner was a citizen and taxpayer of the city of Macon, and owned and possessed a certain described house and contents, all of the value of \$2,100, in said city, located in the area which defendant undertook to supply with water under said contract, and on said date a neighboring dwelling house caught fire from causes unknown, but

88 Tex. 233, 31 S. W. 179; *Britton v. Green Bay Waterworks Co.*, 81 Wis. 48; *Fitch v. Seymour Co.*, 139 Ind. 214, 37 N. E. 932; *Lovejoy v. Bessemer Waterworks Co.* 146 Ala. 374, 20 Am. Neg. Rep. 1, 41 So. Rep. 76; *Met. Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702; *Boston Safe Dep. & T. Co. v. Salem Water Co.*, (C. C.) 94 Fed. 238, and several other cases].

(7) Where a village corporation, authorized to maintain a fire department for the extinguishment of fires within its limits, contracted with a water company to furnish water for the use of its fire department, and certain buildings situate within such limits, and owned by individuals were destroyed by fire by reason of the failure of the water company to furnish an adequate supply of water for the extinguishment of fires, *held*, that the water company was not liable to the individual owners of the property destroyed.

(8) In an action on the case, brought by individual owners of property situate within the limits of a village corporation and destroyed by fire, to recover damages from a public service water

company for their loss on the ground that the loss resulted from the negligent failure of the water company to keep a certain hydrant in proper condition for use, the declaration contained two counts. The first count contained no averment of any express contract either directly between the water company and the plaintiffs or between the water company and the village corporation in which the individual property destroyed by fire was situated but simply stated, as a legal conclusion from its undertaking to render service as a public water company, that it was the defendant's duty arising therefrom to maintain its hydrants at all times in a proper condition for use; while the second count contained a general allegation that the defendant water company undertook to furnish a supply of water under a contract with the village corporation, and stated as a legal conclusion that it was the defendant's duty under the contract to keep its hydrants at all times in proper condition for use, but failed to specify what the stipulations of the contract were which would justify such a conclusion.

through no fault of petitioner. That said fire spread and was communicated to petitioner's house and the contents thereof, so that they were burned and destroyed, to his loss in the sum of \$2,100, despite petitioner's best efforts to prevent the spread of said fire. That before the fire was communicated to petitioner's house the fire alarm had been given, and the city fire department had responded and reached the scene of the fire. After they reached the scene of the

Upon demurrer to the declaration, *held: a.* That individual owners of property destroyed by fire cannot maintain an action on the case against a public service water company for a loss resulting from the negligent failure of the company to furnish a supply of water, either in a case where the duty of the company to furnish water arises solely from an accepted service for general fire purposes, or from a general contract on the part of the water company with the municipality to furnish water for such purposes, without a specification of any particular thing to be done to that end, and without any stipulation respecting liability for losses by fire.

b. That the declaration was not sufficient in substance, and that the action was not maintainable.

In *ANCRUM v. CAMDEN WATER, LIGHT & ICE COMPANY*, (*South Carolina*, April, 1909) 64 S. E. 151, an action for damages for loss by fire of a certain building owned by plaintiff, which loss would not have occurred but for the alleged negligence of defendant in not furnishing an appreciable water pressure for the mains and hydrants through which it had contracted with the city to supply water for extinguishment of fires, judgment for plaintiff in the Common Pleas Circuit Court of Kershaw county was *reversed* on the ground that defendant was not liable under its contract with city for losses

sustained by an individual. The opinion by Woods, J., reviews the authorities on the subject

In *COOKE v. PARIS MOUNTAIN WATER COMPANY*, (*South Carolina*, April, 1909) 64 S. E. 157, judgment for plaintiff in the Common Pleas Circuit Court of Greenville County was *reversed* on the authority of the *ANCRUM* case [preceding paragraph]. The opinion by Woods, J., is as follows: "This is an appeal from an order overruling a demurrer to the complaint. The contract of the defendant with the city of Greenville is not in the record, while in the very similar case of *Ancrum v. Camden Water, Light & Ice Co.*, 64 S. E. 151, the contract of the water company was set out as a part of the complaint. The complaint in this case, however, rests on the proposition that a contract of a water company with a municipality, containing a general stipulation that it would furnish an adequate supply of water for the extinguishment of fires, carries with such stipulation liability to a private owner of property for fire losses which would have been prevented if the defendant had not negligently failed to provide water pressure sufficient to extinguish the fire. The case of *Ancrum v. Camden Water, Light & Ice Co.* holds that the contract does not cover such liability, and that the plaintiff cannot recover. The judgment of the Circuit Court is reversed."

fire they connected the hose with the water plug of the defendant, with the view of extinguishing the fire and preventing damage to petitioner's property, which could easily have been accomplished if the defendant had maintained at that time in its supply pipes the pressure it had agreed at all times to maintain. That at said time there was no appreciable pressure of water in defendant's pipes, and not sufficient supply of water to enable the fire department to employ a steamer to extinguish or confine the fire. That despite the presence, willingness, and efficiency of the fire department, the house and contents burned. The defendant knew that neither the petitioner nor the fire department had any other supply of water than that the defendant had agreed to furnish. That the petitioner was without fault in the matter. That during all the times mentioned the defendant was enjoying valuable franchises in its corporate existence and business, notably the occupancy of the public streets with its water mains, on condition that it should perform the services undertaken under the contract.

"That the said contract was entered into by the defendant with the city of Macon by virtue of an Act of the General Assembly approved September 29, 1891, amending the charter of the city of Macon, and said contract was designed for the service and protection of the taxpayers of the city of Macon, as well as of the city itself. That by reason of said Act of the General Assembly and of said contract defendant was obliged to perform a public duty and an express statutory duty toward the inhabitants, property owners, and taxpayers of Macon, and this duty the defendant did not perform, as averred above, to the special hurt, injury, and damage of petitioner. That defendant's negligence and breach of duty to petitioner consisted in its failure to have in any of the plugs near petitioner's said property an adequate supply or pressure of water for fire protection, and in failing to have the supply and pressure called for by said contract. That there was not at said plugs, and in the mains leading to said plugs, sufficient water to cause a flow at the plugs, and defendant did not have at its plant a sufficient head of steam to give a flow of water. It is therefore ordered that a copy hereof, together with a transcript of the record, be certified to the Supreme Court."

"Exhibit A, being the contract between the city of Macon and the Macon Gaslight & Water Company, is as follows:

"State of Georgia, County of Bibb.

"This indenture, made and entered into this 25th day of November, A. D. 1891, by and between the mayor and council of the city

of Macon, Ga., party of the first part, and Macon Gaslight & Water Company, a corporation duly incorporated under the laws of the State of Georgia, party of the second part, witnesseth: That for and in consideration of the agreements and stipulations hereinafter set forth, and for certain sums of money to be paid as hereinafter provided, and by the authority conferred upon the said city of Macon by an Act of the General Assembly which became a law on the 29th day of November, 1891, the following mutual agreements are entered into:

"Section 1. The party of the second part agrees to furnish the party of the first part with water in sufficient quantities and at all times for fire protection, sprinkling streets, flushing sewers, and the various other purposes in the city offices, police barracks, market, and engine houses, and to supply the citizens of Macon for domestic and manufacturing purposes, during the continuance of this contract, at prices not to exceed the following rates: To the city in its corporate capacity, 200 fire hydrants similar to those already in use, at the rate of \$40 per hydrant per annum. For each additional hydrant \$37.50 per annum until the number rented by the city shall reach 300, when the prices for all shall be reduced to \$37.50 per hydrant per annum. * * * The citizens for domestic or mechanical purposes shall be charged not more than the following rates: Private dwellings for domestic purposes only, through a single opening of one-half inch diameter, per annum, \$6. * * *

"Sec. 2. It is mutually agreed that the said party of the first part shall pay for such water so supplied only as it is received, equal quarterly payments in the months of January, April, July and October of each and every year, and that no indebtedness is incurred by said city of Macon by this contract, other than that which may arise from failure on the part of the said mayor and council to comply with their contract. * * * And for any failure on the part of the party of the second part to furnish the water for the purpose herein specified it shall forfeit the rentals for double the time during which said failures have occurred; provided the temporary failure to supply in a portion only of the city, caused by breaks, repairs, or extensions, shall not be considered a failure as above, nor for failure caused by the act of Providence.

"Sec. 3. The party of the second part agrees to furnish water as clear and as pure as can be obtained in sufficient quantity in practicable reach of the city; and, if any part or all of such supply is taken from the Ocmulgee river, it shall be taken from a point well above the sewerage pollution, and shall be thoroughly filtered.

"Sec. 4. It is hereby agreed by the parties hereto that, at any time during the continuance of this contract, the mayor and council of the city of Macon shall have the right to purchase the system of waterworks used in supplying the city together with all rights, franchises, and good will, at a price to be agreed on at the time of sale. * * *

"Sec. 5. Since the present works of the party of the second part have not the capacity to supply more than the present demand, that said party of the second part agrees to increase the pumping capacity to 5,000,000 gallons per day, and to increase the capacity of its mains by reinforcing those already in use by connecting with them larger pipes at various points, so as to secure better pressure and distribution, or erect filters of modern pattern and ample capacity to supply the needs of the city, and so arranged that they can be increased in the future as the demand increases.

"Sec. 6. It is further agreed between the parties hereto that, as the population and territory to be protected increases, the said party of the second part shall extend its mains and erect hydrants along such streets as may be demanded by the party of the first part: provided the guaranteed income from consumers shall equal six per cent upon the cost of such mains, and the said party of the first part agrees to rent a fire hydrant in addition to those already rented for 500 feet of main so extended; it being understood that the extensions so to be demanded must be along continuous lines of streets, and not more than 10,000 feet or two miles of such extension shall be demanded in any one year, except with the consent of the said party of the second part.

"Sec. 7. For the purpose of carrying out the terms of this contract, it is agreed by the parties hereto that the use of the streets, lanes, alleys, and public grounds, as they now exist or hereafter may be altered, opened, or extended, shall be granted to the party of the second part during the continuance of this contract, for the purpose of excavating trenches and laying down or changing mains, valves, pipes, and conduits: provided, always, that in so excavating trenches and laying down or changing pipes, etc., that the grade of the street shall be adhered to, that the public work shall not be unnecessarily impeded or obstructed, and that the roadway shall be left in practically as good condition as it was before such excavating. * * *

"Sec. 8. As the safety of the property of the citizens is largely dependent upon the proper and efficient management of the waterworks, and to that end rules and regulations are necessary to be observed, it is hereby agreed by the parties hereto that the right of

the party of the second part to enter into the premises of the citizen, by its authorized agents, during the business hours of the day, for the purpose of inspecting the water fixtures used by its customers, is recognized, and its right to shut off the water from any section of the city to make repairs and extensions, after notice, where practicable, but without notice in emergency, as well as its right to refuse to supply customers who neglect to pay for their supply, or who refuse to have fixtures repaired to prevent waste, or who persistently waste the water after five days' notice, and in accordance with the published rules of the party of the second part. And it is agreed that the said rules made for the management of said works from time to time, as are usual in waterworks management, and not in conflict with the city's ordinances or the laws of the State must be observed. And to the end that the property and rights of the waterworks may be protected and waste of water prevented, the following ordinances shall be passed by the party of the first part and become a part of this contract."

"Here follow a number of penal ordinances protecting the property and franchises of the company.

"The Act of the General Assembly approved August 29, 1891 (Acts 1890-91, Vol. 2, p. 566), referred to in the petition and exhibit as certified by the Court of Appeals, was, by its title, 'An Act to amend the charter of the city of Macon and the several Acts amendatory thereof, so as to authorize the mayor and council of the city of Macon to construct a system of waterworks in said city at a cost not to exceed \$412,000, to issue bonds to the amount of \$250,000 for the purpose of constructing said system of waterworks for said city, and to provide for the construction of a portion of said system of waterworks from the revenues derived from the sale of water therefrom, and to authorize the said mayor and council to make a contract with the Macon Gaslight & Water Company for the furnishing of water to said city, with the privilege of purchasing the waterworks used by said Gaslight & Water Company in supplying said city; to provide a commission for the negotiation and sale of said bonds, and for the construction and management and control of said waterworks; to grant certain powers and rights to said commission; * * * to provide for an election for the purpose of procuring the assent of two-thirds of the qualified voters of the city of Macon to the issuing of said bonds; to prescribe a method of registration for said election, and for other purposes.' The Act, after conferring authority upon the city of Macon to construct a system of waterworks and to issue bonds, if authorized by the result

of the election, as provided in the title of the Act, towards payment for the same, and after creating 'the Water Commission of the city of Macon' and prescribing the powers of such commission, among them being authority to sell the bonds if they should be issued in accordance with an election as provided for, in its fourteenth section contained the following provisions:

"That at any time after the passage of this Act, and before the election herein provided for shall be held, the mayor and counsel of the city of Macon shall have authority to make and enter into a contract with the Macon Gaslight & Water Company, for supplying the city with water for a period not to exceed twenty (20) years. * * * There shall be embodied in said contract the privilege to the mayor and council to purchase the system of waterworks used in supplying the city, at any time during the period for which said contract is made, at a price to be agreed upon at the time of sale between the parties to said contract. * * * (And) before said purchase shall be made, the assent of two-thirds of the qualified voters of the city of Macon shall be obtained, in the manner now or which may hereafter be provided by law, to the incurring of the indebtedness for the purchase of said waterworks. When such contract is made, * * * there shall be embodied in said contract a scale rate, showing the price to be paid by private consumers of water; and the mayor and council shall require a bond with good security, in the sum of \$100,000, for the faithful carrying out of said contract by the Macon Gaslight & Water Company; provided, that while said contract shall be made by the said mayor and council of the city of Macon with said Gaslight & Water Company, in the event that the provisions in this Act to issue bonds for the erection of a system of waterworks by a commission, as herein provided for, shall receive the assent of two-thirds of the qualified voters of the city of Macon, as provided for in section 13 of this Act, then said contract shall no longer be of force and effect, but shall discontinue and be inoperative as though never made. If the provisions of this Act, as to the issue of bonds, shall not be ratified by the said votes as required, then said contract shall still remain and continue in full force and effect."

"The Act then provides that if no contract be entered into prior to the election for bonds, or if such election should not result in favor of the issuance of bonds, then the mayor and council shall have authority to make a contract with the water company for the period of twenty years for supplying the city with water, under the same

terms and conditions and stipulations as contained in the Act in reference to a contract made prior to such election."

T. J. COCKRAN and HALL & HALL, for plaintiff in error.

N. E. & W. A. HARRIS, for defendant in error.

FISH, CH. J. (after stating the foregoing facts).—The great weight of authority is to the effect that a resident of the city cannot recover of a waterworks company damages for loss by fire occasioned by the failure of such company to furnish, in accordance with its contract with the city, a sufficient supply of water to extinguish the fire. *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S. E. 673; *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; *Atkinson v. Newcastle & Gateshead Waterworks Co.*, L. R. 2 Ex. D. 441; *Foster v. Lookout Water Co.*, 3 Lea. (Tenn.) 42; *Davis v. Clinton Waterworks Co.*, 54 Iowa, 59, 6 N. W. 126; *Ferris v. Carson Water Co.*, 16 Nev. 44; *Beck v. Kitanning Water Co.*, 8 Sadler (Pa.) 237, 11 Atl. 300; *Mott v. Cherryvale Water Co.*, 48 Kan. 12, 28 Pac. 989; *Howseman v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784; *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546, 56 N. W. 201; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982; *Wainwright v. Queens Water Co.*, 78 Hun, 146, 28 N. Y. Supp. 987; *Bush v. Artesian, etc., Water Co.*, 4 Idaho, 518, 43 Pac. 69; *Akron Waterworks Co. v. Brownless*, 10 Ohio Cir. Ct. R. 620; *Stone v. Uniontown Water Co.*, 4 Pa. Dist. R. 431; *House v. Houston Waterworks Co.*, 88 Tex. 233, 31 S. W. 179; *Boston Safe Dep. etc., Co. v. Salem Water Co. (C. C.)* 94 Fed. 238; *Wilkinson v. Light, Heat & Water Co.*, 78 Miss. 389, 28 So. Rep. 877; *Britton v. Green Bay Waterworks Co.*, 81 Wis. 48, 51 N. W. 84; *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290; *Town of Ukiah v. Ukiah Water, etc., Co.*, 142 Cal. 173, 15 Am. Neg. Rep. 493, 75 Pac. 773; *Allen & Cunry Mfg. Co. v. Shreveport Water Co.*, 113 La. 1091, 37 So. Rep. 980; *Metropolitan Trust Co. v. Topeka Water Co. (C. C.)* 132 Fed. 702; *Blunk v. Denison Water Supply Co.*, 71 Ohio St. 250, 73 N. E. 210; *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 20 Am. Neg. Rep. 1, 41 So. Rep. 76; *Peck v. Sterling Water Co.* 118 Ill. App. 533; *Metz v. Cape Girardeau Waterworks Co.*, 202 Mo. 324, 100 S. W. 651; *Thompson v. Springfield Water Co.*, 215 Pa. St. 275, 64 Atl. 521; *Hone v. Presque Isle Water Co. (Me.)* 71 Atl. 769; *Bienville Waterworks Co. v. Mobile*, 112 Ala. 260-266, 20 So. Rep. 742; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 44 N. W. 694; *Smith v. Great South Bay Water Co.*, 82 App. Div. 427, 81 N. Y. Supp. 812. The reason for the doctrine is given in most, if not all, of these cases.

This doctrine has not been adhered to in Kentucky, North Carolina,

and Florida. *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249; *Gorrell v. Water Supply Co.*, 124 N. C. 328, 32 S. E. 720; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 42 So. Rep. 81. The Kentucky and North Carolina cases have been criticized in many of the cases wherein the doctrine above announced has been recognized and applied and the reasoning in the *Mugge* Case and that of the majority of the court in *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 26 Sup. Ct. 186, which seems to have been followed in *Mugge's* Case, is criticized in the editorial note on the last-mentioned case in 6 L. R. A. (N. S.) 1171. There is nothing new to be added on the subject, and it would be supererogatory to set forth the reasons given by the various courts in sustaining the doctrine and of those repudiating it. Moreover, the question certified must, in our opinion, be solved by following a former decision of this court in *Fowler v. Athens City Waterworks Co.*, *supra*, where it was held: "Against a water company which is under a contract obligation with the municipal government (but no legal duty otherwise), to furnish a supply of water for use by the municipality in extinguishing fires, a citizen and taxpayer, whose property has been consumed by reason of a breach of such contract obligation, has no right of action; there being no privity of contract between the citizen and the water company, and mere breach (by omission only) of a contract entered into with the public not being a tort, direct or indirect, to the private property of an individual."

In that case, as we have ascertained from an examination of the original record on file in this court, the mayor and council of the city of Athens entered into a contract with one Robinson in 1882, whereby Robinson undertook that he would furnish at all times, for a consideration mentioned in the contract, all the water necessary for fire purposes; that he would establish fire hydrants to the number of fifty-five, and would guarantee at all times a sufficient pressure to throw from any of these hydrants, through a one-inch nozzle and fifty feet of two and one-half-inch hose, five streams of water to the height of sixty-five feet. He further agreed to furnish consumers other than the city with pure and wholesome water at a rate not exceeding that in a list appended to the contract and made a part thereof. By the terms of the contract the city was to have the right to purchase Robinson's waterworks when the same should be completed, or at the end of each ten years thereafter, at a price to be fixed by arbitrators to be selected as provided in the contract. The city in the contract expressly granted to Robinson and his successors

or assigns the exclusive right to erect and maintain waterworks as contemplated in the contract, "and also the free and unrestricted right and privilege at any and all times to lay, construct, maintain, repair, and tap all mains, pipes, hydrants and other fixtures and appurtenances in, upon under, and through any and all streets, avenues, lanes, alleys, roads and bridges within said city." It was also stipulated in the contract "that it (the city) will pass, and at all times during the continuance of this contract maintain and enforce, such ordinances as may be necessary and proper to enable said contractor to construct and control his works and protect the same."

It will be seen therefore that the decision in that case, when construed in the light of the facts upon which it was predicated, is controlling in the present one; for the court there not only held, treating the plaintiff's action as being one *ex contractu*, under the contract between the city and the waterworks company, that he could not recover, as there was no privity of contract between him and the company, but it also clearly and distinctly held that he could not recover if his action against the company were treated as being on *ex delicto* — that is, upon an alleged tort arising from a breach of a public duty which the company, under its contract with the city, owed the plaintiff. What was said by Chief Justice Bleckley in denial of the right of the plaintiff to recover, upon the facts alleged in his petition, if his action were treated as one sounding in tort, was by no means *obiter*; for it is clear, from reading the statement of the case by him and the opinion which he delivered therein, that the court did not undertake to determine whether the petition was intended to set forth a cause of action arising *ex contractu* or a cause of action arising *ex delicto*. But the court, without construing the petition the one way or the other, simply but decisively determined that, whether the petition sounded in contract or in tort, it failed to state a cause of action, as the plaintiff could not recover on contract, because he was not privy to the contract which the city made with the waterworks company, and he could not recover in tort, because, under the facts alleged, there was relatively to him no breach of a public duty by the water company. With reference to this last-mentioned view or construction of the petition, the learned Chief Justice said: "There being no ground for recovery, treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the

government. Unless made so by statute, a city is not liable for failing to protect the inhabitants against destruction of property by fire. *Wright v. Augusta*, 78 Ga. 241, 7 Am. & Eng. Enc. Law, p. 997 *et seq.* We are unable to see how a contractor with the city to supply water to extinguish fires commits any tort by failure to comply with his undertaking, unless to the contract relation there is superadded a legal command by statute or express law."

As will have been seen, the material facts in the case at bar are practically the same as those in the *Fowler Case* [83 Ga. 219, 9 S. E. 673]. While Robinson, the contractor in the *Fowler Case*, was an individual, and his successor and assignee, the Athens City Waterworks Company, does not appear to have been incorporated, and the contractor in the case now in hand was a corporation, this difference certainly would not alter the principle to be applied in the present case; nor would such principle be affected by the fact that in the case before us the contract between the city of Macon and the waterworks company was expressly authorized by the Act of 1891, amending the charter of the city of Macon, whilst in the *Fowler Case* it does not appear that express legislative authority was given to the city of Athens to enter into the contract therein involved. Such city did not need express authority to make the contract; for it is well settled that under the "general welfare clause," usually found in the charters of towns and cities, such municipalities have the authority to enter into contracts and to exercise the power of taxation, within the limits fixed by the Constitution, for the purpose of providing their inhabitants with water for domestic use, as well as to provide the city with water to protect its inhabitants from loss by fire. *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907, and cases cited. The "general welfare clause" was contained in the charter of the city of Athens. The same right to use the streets of the city for the purpose of laying water mains, etc., was given to Robinson, under the contract he made with the city of Athens, as was given to the waterworks company in the case in hand, under the contract it entered into with the city of Macon, and the obligations to be performed by the contractors in each of the cases were of the same character. To our mind, therefore, the *Fowler Case* is, as we have already said, absolutely controlling in the present case, and requires that the question certified to this court by the Court of Appeals shall be answered in the negative; that is, that Holloway's petition set out no cause of action against the Macon Gaslight & Water Company. Here, as there, there was a "violation of a contract entered into with the public, the breach being by mere

omission or nonfeasance," which "is no tort direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government."

The plaintiff in error relies upon *Freeman v. Macon Gaslight & Water Co.*, 126 Ga. 843, 56 S. E. 61. It was there held: "When a private corporation, in the exercise of a franchise granted by a municipality, pursuant to a statute which confers upon it the right to use the streets of the city on condition that it will therein lay its mains and furnish the municipality and its inhabitants with a supply of water at fixed tolls, engages in the business of supplying the general public with water, it becomes liable as a public service corporation for its wrongful act in cutting off the supply of water which it is under the duty to furnish one of its patrons as a member of the public at large." This ruling when applied to the facts of that case, is not contrary to what was held in the *Fowler Case*. Indeed, Mr. Justice Evans, who delivered the opinion, expressly states therein: "What we have said in no way conflicts with the principle decided in *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219, 9 S. E. 673. There the water company was sought to be held liable to a private citizen because of a failure to perform a duty owing to the municipality, under a contract with it to furnish it an adequate supply of water for fire protection. The city, in the exercise of its governmental functions, undertook to afford its citizens adequate fire protection—not by itself laying mains and maintaining a water supply plant, but by hiring one Robinson to do so." The ruling in the *Freeman Case* was to the effect that when the water company, under the franchise which it had accepted and the contract which it had made with the municipality, engaged in the business of supplying the public at large with water for certain purposes, it became a public service corporation, and, as such, was under a public duty to *Freeman*, one of its customers, and a member of the public at large served by such company, to furnish him, as a private consumer, a sufficient supply of water in accordance with the contract, and that the breach of such duty, by wrongfully cutting off his supply of water, was a tort, for the commission of which it was liable to him in damages.

It will be readily seen that the facts in the *Fowler Case* and those in the case with which we are now dealing are quite different from the facts in the *Freeman Case*, and involve the application of different principles of law. In the *Freeman Case* the duty which the water company assumed, by accepting its franchise, entering into the contract with the municipality, and engaging, as a public service corporation, in the business of supplying the inhabitants of Macon with

water for domestic purposes, was a public one, which it owed to Freeman as a member of the public at large. As a public service corporation, operating under a franchise which gave to it the right to occupy and use the streets, etc., for the purpose of laying therein its mains, etc., and carrying on its business, and engaging in the business of supplying the public at large with water at fixed tolls, it owed certain public duties to Freeman and every other member of the community standing in the same relations to it, the breach of which constituted a tort. While the contract between the city and the water company in the present case is the same as the one involved in that case, the breach of duty relied on here is not the same as the breach of duty relied on there. The water company, as a public service corporation, did not, under its contract with the city of Macon, nor, so far as appears in this case, in the conduct of its business, undertake to supply the public at large with water from the city hydrants for the purpose of extinguishing fires, nor did it undertake to supply Holloway, the plaintiff in error, with water for fire protection. As to a supply of water from the city hydrants for fire protection, all that the water company undertook to do was to furnish such water to the city in its corporate capacity; and whatever breach of duty it may have committed by its failure so to do upon the occasion of the fire in question was a breach of the duty which it owed to the city, and not a breach of any public duty which it owed to Holloway and other members of the public at large of the city of Macon.

LAMB V. LICEY ET AL.

Supreme Court, Idaho, June, 1909.

1. ACT OF GOD.—No liability attaches for damages sustained by reason of an act of God or forces of nature.
2. FLAG POLE BLOWN DOWN BY WIND STORM—NEGLIGENCE—EVIDENCE.—*Held*, under the facts of this case, that the defendants did not negligently erect or carelessly, negligently, or wrongfully maintain the flag pole which was the cause of the accident complained of in this action (1.)

1. For actions in which the defense of "Act of God" is interposed, see Vols. 1-20 AM. NEG. REP., and the new AMERICAN DIGEST (1909 edition) covering those volumes (from 1897 to 1907), under the title "ACT OF GOD."

3. ACT OF GOD.—*Held*, under the facts of this case, that the defendants are not liable.
4. PRACTICE—REVIEW—QUESTIONS OF FACT.—Under the provisions of section 4824, Rev. Codes, when there is substantial evidence to support the verdict, the same will not be set aside on appeal. (*Syllabus by the Court.*)

APPEAL from District Court, Boise County.

ACTION by Eva E. Lamb, as administratrix, against B. Lacey and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. The facts appear in the opinion. *Reversed and remanded, with directions to enter judgment for defendants.*

HAWLEY, PUCKETT & HAWLEY, for appellants.

KARL, PAINE and H. L. FISHER, for respondent.

SULLIVAN, CH. J.—This action was commenced by the respondent, as plaintiff, to recover \$20,000 damages against the appellants for the alleged wrongful death of the respondent's husband, by reason of the careless, negligent, and wrongful maintenance of a flag pole. The principal allegations of the complaint were: That the defendants and others were members of the local camp of Modern Woodmen of America at the village of Sweet, in Boise county, which camp, it is alleged, is a voluntary unincorporated association securing life insurance of its members and promoting their special and fraternal interests; that as such members they were in possession of a building known as the Woodmen's Hall; that they, as such members, carelessly, negligently, and wrongfully maintained a flag pole in front of and in connection with said hall; that the said flag pole rotted at a point near where it emerged from the ground, and the rotted and decayed condition thereof by the exercise of ordinary care on defendant's part could have been ascertained; that the plaintiff's intestate lived so close to the pole that the defendants were bound to know that the pole in falling might injure or kill said intestate; that the pole did break off at the point where rotted and decayed, and in falling did kill said intestate. Then follows the usual allegation for damages. The defendants demurred to the complaint on several grounds: First, on the ground that the complaint did not state facts sufficient to constitute a cause of action; second, that there is a defect of parties defendants, and that the complaint is ambiguous, specifying wherein the ambiguity exists. The court overruled the demurrer. In their answer several of the defendants denied practically *in toto* the allegations of the complaint, and, as a further answer, that they had joined said Woodmen Lodge since the death of said intestate. The answer of the other defendants was a practical denial of all the

material allegations of the complaint, while both answers pleaded that the flag pole was erected by the people generally in the vicinity of Sweet and was used as a liberty pole by the whole people of the vicinity; that it was not erected by or at the cost of the said Woodmen Camp; that the pole was carefully selected, and no decay appeared thereon; that as an inevitable act of God the pole fell, blown down by an extremely high wind; that the deceased had equal opportunities with all, and better than most of the defendants, to inspect and notice the condition of the pole, and voluntarily erected his tent in its proximity. Allegations of contributory negligence on the part of the intestate were made, as well as allegations as to the lack of negligence on the defendants' part. The case was tried by the court with a jury, and the jury returned a verdict of \$3,600 in favor of plaintiff; \$600 in favor of the widow; \$800 in favor of Myrtle R.; \$1,200 in favor of Walter W.; and \$1,000 in favor of Pearl Lamb, children of said deceased. During the trial a motion was made to dismiss as to the defendants who joined said society subsequent to the death of said intestate, which motion was sustained. A motion for a new trial was overruled, and the appeal is from the judgment and the order denying a new trial. Numerous errors are assigned; but, in our view of the matter, it will not be necessary to pass upon each assignment separately. The complaint is framed upon the theory that the members of said Woodmen's Lodge are liable because that lodge carelessly and negligently maintained said flag pole. After alleging that said defendants are members of said Woodmen Lodge, and that they were in possession of a certain building in the said village of Sweet, commonly known as the "Hall of the M. W. A.," allege as follows: "And as such members were then and there, and for a long time prior thereto had been, carelessly, negligently, and wrongfully maintaining in front of and in connection with said hall a long and very heavy pole, which they used as a flag pole, and on and from which on divers occasions prior thereto have raised and hung the flag of the United States." The case was tried by the plaintiff upon the theory that said Lodge, or the members thereof, were liable for the damages resulting in the death of said deceased. During the trial it appeared from the evidence that several of the defendants named had joined said Woodmen Lodge subsequent to the death of the intestate, and on motion the court granted a nonsuit or dismissed the action as to them, and as to those who were members of said Lodge before the pole was erected the motion for nonsuit was denied. It is thus made to appear that the respondent sought to hold the

members of said Woodmen Lodge liable for the death of her intestate.

It clearly appears from the evidence that said society, as a society, never had anything whatever to do with the purchase and erection of said pole. It was erected in the street about ten feet in front of the Modern Woodmen Society's building. It appears: That a subscription was taken up by a person who was not a member of said society, for the purchase and erection of said flag pole; that nearly all of the citizens in the community contributed something for that purpose from twenty-five cents to two dollars each; that a number of the members of said society contributed to the expense of the purchase and erection of said pole, but not as members of such society, but simply as other citizens had contributed. The flag used on said pole was purchased by contributions from the people. It appears that the day that said pole was erected was celebrated as a holiday, and the people from the surrounding country attended, and speaking and other exercises were had on that day. Said pole was used as a public flag pole, and any one who wanted to raise the flag on it did so. The raising of the flag seemed to be a public right. Any one in the community had a right to raise it. The deceased himself, during his lifetime, raised, or assisted in raising, the flag at different times. It was the general understanding that the pole, having been purchased and erected by the general public, could be used by anybody and everybody. One of the witnesses testified as follows: "The flag was raised on all public occasions. The Woodmen Camp had nothing more to do with the flag pole than the other people. Every one had the privilege of raising the flag. * * * Part of the time the flag was in the hall, because it was a convenient place. Part of the time it was in our store, and part of the time in my home. * * * The last time the flag was raised was September 29, 1906. John Brown and Mr. Lamb (the intestate) raised it. There was a Democratic convention there." One Dennis Crowley, not a Woodman, controlled the placing of the pole. It further appears that the pole was carefully examined at the time it was set, that it was a black pine pole containing pitch up for about seven feet from the bottom, and it further appears that poles like that in that vicinity had lasted for many years set in the ground. The deceased lived near the pole in a tent, and had lived there from April 10th up to October 11th, the date of the accident. He had assisted in raising the flag on that pole. He had often lounged around the pole, and even leaned against it. The wind which blew down the pole was the most severe ever known in that region of the country, was of un-

precedented velocity, causing much damage and destruction of property. The sheriff of Boise county, who was neither a Woodman nor a resident of the town of Sweet, testified as follows: "I have lived in Boise county for thirty-six years, and am familiar with Sweet and vicinity, and never at any time since my residence in the county was there a storm approaching in intensity to that storm." Another old resident, testified as follows: "It was the hardest wind I had ever seen since I have been in the country. The dust was so thick you could not see a person ten feet."

It will be observed from the foregoing: That said Woodmen Society had nothing whatever to do with the erection or maintenance of said flag pole; that the allegations of the complaint to the effect that the defendants, as members of said society, "were then and there, and for a long time prior thereto had been, carelessly, negligently, and wrongfully maintaining in front of and in connection with said hall a long and very heavy pole," is not sustained by the evidence in any particular, for the evidence clearly shows that they, as members of said society had nothing whatever to do with the purchase, erection, or maintenance of said pole.

An exhibit, consisting of a part of said pole where it had broken, was introduced in evidence. This exhibit shows that the pole was considerably rotten just beneath the surface of the ground, but might have withstood the ordinary storms of that region of the country for many years, as it had only been in the ground about five or six years, and the evidence shows that poles of that kind in that region of country had withstood the action of the soil and the weather for from twenty to thirty years. The wind storm that caused the falling of the pole was one of unprecedented velocity and intensity. A wagon spoke was blown through a window. Trees were blown down. A pine tree two feet in diameter was broken off four or five feet from the ground. Header boxes, weighing from 900 to 1,000 pounds, were picked up and dashed to the ground and broken in pieces. A barn was blown away. A shed barn eighteen by forty feet, was unroofed. A hayrack, weighing 600 to 700 pounds on a wagon, was picked up and carried 147 feet from where the wagon stood and badly broken. It appears from the record that the pole was blown down by a very severe wind storm for that region, and that said storm was the immediate cause of the damage done. It further appears that the general public was responsible for the erection and maintenance of said pole, and not the Modern Woodmen of America Society, as that society, as a society, had nothing whatever to do with the erection and maintenance of it. The evidence shows that the death of plain-

tiff's intestate was caused by the extraordinary disturbances of nature, of violent wind, commonly called the act of God, and that the death of the intestate was not caused by reason of the negligence and carelessness of the defendants in maintaining said flag pole or by any act or omission on the part of the defendants. The record shows that said intestate established his tent wherein he resided within reach of said pole, and that he had every opportunity that any of the defendants had of discovering the condition of said pole. He had lived within a few feet of it from April to October, had sat on the sidewalk near the pole, and was no doubt of the same opinion as others in regard to the strength and ability of said pole to withstand the winds of that region of country. While the accident was a very unfortunate and sad one, the record fails to show that the appellants were in any manner responsible for it.

For the reasons above suggested, it is not necessary for us to pass upon the other assignments of error. It is provided by section 4824, Rev. Codes 1909, among other things, that, whenever there is substantial evidence to support a verdict, the same shall not be set aside on appeal. In this case we find there is no substantial evidence to support the verdict, and it must therefore be set aside. As the record shows the respondents could not recover in this case, it would be useless to order a new trial.

The judgment is therefore set aside, and the cause remanded with instructions to the District Court to enter judgment in favor of the defendants. Costs of this appeal are awarded to appellants.

STEWART and AILSHIE, JJ., concur.

ROCKHILL v. CONGRESS HOTEL COMPANY.

Supreme Court, Illinois, December, 1908.

INNKEEPER—DUTY AND LIABILITY TO GUEST FOR LOSS OF GOODS—BURDEN OF PROOF—PRESUMPTION OF NEGLIGENCE.—An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and, if the property is lost, all that is necessary to make a *prima facie* case is to show the relation of innkeeper and guest and the loss, and the burden is then upon the innkeeper to exonerate himself, the loss of the goods raising a presumption of negligence on the part of the innkeeper (1).

1. Similar ruling in the cases appended as a note to the case at bar. See next paragraph (note 2).

STATUTE—INNKEEPERS' ACT—LOSS OF PERSONAL PROPERTY OF GUEST—NEGLIGENCE OF SERVANT OF INNKEEPER—LIABILITY.—The Innkeepers' Act (Laws, 1861, p. 133) which provides that every innkeeper who shall keep an iron safe in good order and suitable for the purpose and shall post the notices provided for shall not be liable for any money, jewelry, or other valuables of gold, silver or rare and precious stones that may be lost, if the same are not delivered to the innkeeper, his agent, or clerk for deposit, affords no protection to the innkeeper where such loss occurs by the negligence of the porter or servant of the innkeeper.

Applied, in an action against a hotel company to recover the value of a hand bag and its contents lost while the owner thereof was a guest in one of defendant's hotels, where the guest packed her goods to leave the hotel and gave them in charge of the porter sent to receive them, and defendant was held liable for the loss (2).

2. Innkeepers—Loss of personal property of guests—Liability.—In *NELSON v. JOHNSON*, (*Minnesota*, June, 1908) 116 N. W. 828, an action for money stolen from a guest in defendant's hotel, judgment for plaintiff in the Municipal Court of Minneapolis for ninety-five dollars was *affirmed*. The syllabus by the court (opinion by START, CH. J.) states the case as follows:

"The defendant held out his house, of which he was the keeper, as a hotel in which furnished rooms were to let for a single night or longer time. In the regular course of business he let, without special contract, at stipulated prices, rooms therein for a single night or a longer time, as was desired, to all who applied in a fit condition to be received. He kept an office therein, which was in charge of clerks and open at all hours for the reception of guests, in which a register was kept for the guests to inscribe therein their names and addresses. There were not maintained at or in connection with the house any facilities for supplying guests with food, and none was furnished to them by the defendant. *Held*, that the house was a public hotel, and that the defendant, as keeper there-

of, was liable to the plaintiff, a traveler who was a guest therein, for money stolen in the nighttime from him, while he was in his room, without the negligence of either party."

In *HEISER v. BERGER CATERING CO.*, (*Missouri Appeals*, *St. Louis*, December, 1907) 106 S. W. Rep. 597, it was *held* that: "a hotel keeper who conducts his place as a hotel is a bailee of a suit case left in his care, and owes a duty to use ordinary care to keep it safely and deliver it on demand, and on failure to do so, or to show that any care was exercised, is liable in an action for conversion for the value of the case and its contents."

In *METZLER v. TERMINAL HOTEL CO.*, (*Missouri Appeals*, *St. Louis*, January, 1909) 115 S. W. 1037, it appeared that plaintiff became a transient guest at a hotel conducted by defendant, registered and was assigned a room, and checked his valise at the office. On presenting the check for the return of the valise it could not be found. Plaintiff instituted an action for conversion of the property and to recover the value of it from defendant in his capacity of innkeeper. Judgment in the St. Louis Circuit Court for plaintiff, and defendant appealed.

APPEAL from Appellate Court, First District, on Writ of Error to the Municipal Court of Chicago.

ACTION by Valette R. Rockhill against the Congress Hotel Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant, on a certificate of importance by the Appellate Court, appeals. The case is stated in the opinion. *Judgment affirmed.*

GOODRICH, VINCENT & BRADLEY (JOSEPH M. GRIFFEN, of counsel), for appellant.

W. S. OPPENHEIM, for appellee.

CARTWRIGHT, C. J. — Valette R. Rockhill, appellee, brought this suit in the Municipal Court of Chicago against Congress Hotel Company to recover the value of a hand bag and contents lost while she was a guest at the Auditorium Annex, one of the defendant's hotels. The case was tried upon a written stipulation as to the facts, which was submitted to the court, and defendant thereupon demurred to the evidence. The demurrer was overruled, and the defendant then

The defense was that defendant was not an innkeeper or subject to the extraordinary liability of one. The St. Louis Court of Appeals (per GOODE, J.) discussed the question at length citing many authorities, and held defendant was liable as an innkeeper. Judgment for plaintiff *affirmed.*

In *DE LAPP v. VAN CLOSTER*, (*Missouri Appeals, Kansas City*, March, 1909) 118 S. W. 120, an appeal from a judgment for plaintiff in the Jackson County Circuit Court in an action to recover damages for loss of a package containing money which had been deposited for safe keeping in defendant's hotel, judgment was *reversed*, it being held that at the time of the transaction plaintiff was not a guest entitling him to recover upon defendant's liability as an innkeeper. The court (per BROADBUSH, P. J.) in discussing the question whether plaintiff was a guest cited *Overstreet v. Moser*, 88 Mo. App. 72: "A guest is a transient person, who resorts to, and is received at, an

inn for the purpose of obtaining the accommodations which it purports to afford." The court also quoted from *Words and Phrases*, and cited *Curtis v. Murphy*, 63 Wis. 4, and said: "We believe the rule as stated in *Overstreet v. Moser*, is a proper definition of what it takes to constitute a guest, and that the testimony shows that the plaintiff was a guest of the defendant's hotel when he registered and paid for his lodging, and we think it immaterial whether he became such upon the American or European custom. It is reasonably clear that when the plaintiff surrendered the key to his room at six o'clock p. m. of June 17th, and left without returning, he ceased to be a guest of the inn. The fact that he had paid for his room for twenty-four hours, which would carry the time up to midnight, is of no significance in determining the question of whether he was a guest of the inn if before the expiration of that time he had left the inn without any inten-

moved the court to enter a judgment against it for sixty-six dollars, being the value of the hand bag and certain articles named in the stipulation. The court denied that motion, and found the issue for the plaintiff and entered judgment for \$585 and costs. A writ of error was sued out from the Appellate Court of the First District, and the judgment was there affirmed. The Appellate Court granted a certificate of importance, by virtue of which the case is brought to this court by appeal.

A preliminary question is raised as to the power of the Appellate Court to grant a certificate of importance in a case of the fourth class, which by the Municipal Court Act can be reviewed only by writ of error sued out from the Appellate Court. The Act in relation to a Municipal Court in Chicago (Laws of 1907, p. 226) and the Act in relation to practice in courts of record (Laws of 1907, p. 444) were approved on the same day. Section 119 of the Practice Act provides that the Appellate Court may make a certificate of importance and grant an appeal in any case decided by

tion of returning to it. The fact that he did not intend to return, and did not in fact do so, it seems to us is conclusive on that question.

"Therefore instruction numbered III, given for plaintiff, to the effect that he continued to be a guest of the inn until the time expired for which he had paid for the accommodation of the hotel, was erroneous and misleading, as the jury might well have concluded from the language used that he was to be considered a guest for so long as he had paid for the use of the room. We cannot conceive how one could be considered the guest of an inn without being an inmate at the time or temporarily absent intending to return. The vice of the instruction is glaring when we come to consider that the evidence shows that the money must have disappeared between the time of its deposit with the clerk and 7:30 o'clock p. m. of the day. As plaintiff discontinued his relation as guest at six o'clock p. m., and

if the money was taken after that time, and between 7:30 o'clock and that time, defendant would not be liable for the loss, as the plaintiff would not be his guest. And as it would be a matter of conjecture as to what time the money did disappear, whether before or after six o'clock p. m., the plaintiff was not entitled to go to the jury notwithstanding the instruction had been properly framed. We are persuaded that the plaintiff as a matter of fact did not make the deposit for its security while he might be defendant's guest but that he deposited it on call or until he should be ready to make his visit to Indiana. The evidence seems to be conclusive on this phase of the case. He had been carrying the money around on his person for about a week previous, had it with him when he went to bed on the night of June 16th, deposited it on the following morning, and made no inquiry or call for it until three weeks afterward. A man under

that court in which an appeal or writ of error from the Appellate Court to this court is not allowed by said Act. The Municipal Court Act does not make the judgment of the Appellate Court final in cases of the fourth class removed to that court by writ of error, and the Practice Act does not provide for an appeal from or writ of error to the Appellate Court in a case of this kind. We are of the opinion that the Practice Act authorized the appeal. The case was tried in the Municipal Court without a jury on the stipulation of facts, and the demurrer to the evidence was verbal. The practice of demurring to evidence is but seldom resorted to, and it has always been the rule that a demurrer of that kind must be in writing and set out particularly the facts which the evidence fairly tends to prove, and not the evidence which tends to prove the facts, and admitting the facts leaves the court nothing to do but to apply the law to them. *Creach v. Taylor*, 2 Scam. 277; *Crowe v. People*, 92 Ill. 231. Whether the practice of demurring to the evidence is applicable to the Municipal Court exercising its jurisdiction in cases of the fourth class, where

such circumstances would not likely have made the deposit as a matter of security while a guest of the inn."

In *HOLSTEIN ET UX. v. PHILLIPS & SIMS*, (*North Carolina*, December, 1907) 59 S. E. 1037, appeal from judgment for plaintiffs in action for loss of goods and jewelry at defendant's hotel, judgment was *affirmed*. The syllabus in 59 S. E. (para. 7) states the case as follows:

"A woman came to a summer resort from another State and entered into an agreement with the 'proprietors of the Imperial Hotel,' running a general hotel business during the summer as a summer resort, that she would stop there at \$10 per week (a reduced rate); no definite time being fixed. *Held*, that the relation of innkeeper and guest was created, so that the hotel was liable as insurer for the loss of money and jewelry stolen from a trunk in the guest's room during her temporary absence, the keys of the room being either in

her possession or in the possession of the clerk all the time she was away from the room, since under the express provisions of Revisal 1905, § 1913, by a failure of the innkeeper to comply with its provisions as to the posting of notices of the provisions of the chapter in the hotel office and rooms, the rule of the common law applied"

The opinion was rendered by HOKE, J., who cited and quoted several authorities defining "guest," "boarder," "inn" and "hotel."

In *WATT ET EX. v. KILBURY ET UX.*, (*Washington*, June, 1909) 102 Pac. 403, appeal from judgment for plaintiffs in the Superior Court, Spokane County, in an action for recovery of value of certain money and personal property stolen while they were guests in defendant's hotel, judgment for plaintiffs was *affirmed*. The opinion was rendered by GOSE, J., in the course of which he said:

"The evidence discloses the following facts: The respondents, a farmer and his wife, sold a tract of

there are no written pleadings and the procedure resembles that of justice courts, is not here considered. Counsel on both sides treat the demurrer as a motion to the court to find for the defendant for want of any evidence tending to prove a cause of action, and, whether considered as a demurrer to the evidence or as such a motion, the court was clearly right in the ruling since even on the theory of the defendant it was liable for the loss of the hand bag and of certain articles contained in it, which it admits are usually and ordinarily carried and used by travelers and guests of hotels. The effort in this court is to obtain a decision that the Municipal Court erred in permitting a recovery for jewelry, for the loss of which defendant claims it was not liable; but that question was not raised by the demurrer to the evidence and relates only to the amount of damages. The defendant presented to the court a number of alleged propositions of law, one of which was held and the others refused, and it is insisted that the court erred in such refusal.

The facts admitted by the stipulation were in substance, as fol-

land, received therefor something over \$400 in money and a note and mortgage for \$500, and then went to Spokane, primarily to secure treatment for the wife, who was past sixty years of age and in ill health. They became guests in the appellants' hotel on the 19th day of October, 1907, and had a room assigned to them, which they continued to occupy until December 2d following. While sustaining the relation of guests at such hotel, they kept this money and the note and mortgage in a small hand bag which the wife usually carried when absent from the room. On November 6th the wife was absent from the room for a few minutes, leaving the hand bag with its contents on the bed. Upon her return she discovered that it had been taken from her room during her absence. She at once called her husband who was sitting in the hotel office near the room, and who had been absent at the same time, and advised him of the loss. A few

days later they found the note in the top of their trunk in a closet connected with their room. These are the facts as detailed by the respondents. There are statements in the record to the effect that, upon the discovery of the loss of the hand bag, the respondents, particularly the wife, became quite agitated, and that they each made statements to the effect that the wife had left the hand bag at a restaurant in the same building as the hotel. However, the same witnesses who gave this testimony also said that later the respondents claimed that the hand bag had been taken from the room. To other witnesses the respondents always asserted that the hand bag had been taken from their room in the hotel. The manager of the restaurant who had seen the respondents come to their meals from day to day and had observed the wife carrying the bag, testified that she did not have it with her when she came into the restaurant the day

lows: The plaintiff, with her husband, her mother, her sister, and another lady, forming one party, were guests at the Auditorium Annex, and occupied a suite of rooms. The party had with them at the hotel, in their rooms, two trunks, two hand bags, a dress suit case and a wooden box. One of the hand bags belonged to the plaintiff, and she had packed in it a number of articles for use which, with the hand bag, amounted in all to sixty-six dollars, and she also had in it various articles of jewelry and ornaments, making a total value of \$585 for the hand bag and its contents. The stay of the party at the hotel came to an end, and their baggage was packed for the purpose of leaving. The plaintiff notified the clerk of the defendant that she was about to leave the hotel, and to send up to her room for the baggage. She remained in the room until a porter of the defendant came up for the baggage and it was delivered to him. She told the porter to take the checks for the baggage to the head porter's desk, and she would go there and get them. When she went to the desk to obtain the checks, she was given one less check than the number of pieces

the goods were taken. Considering the age of the respondents, the wife being past sixty, and the magnitude of the loss as it appeared to them, we do not regard these conflicting statements as serious. The evidence as an entirety is quite conclusive that the bag with its contents was taken from the room of the respondents during their absence, and that only a few minutes intervened between their leaving the room and returning to it at such time. The respondents on December 2, 1907, left the hotel and, in order to get their baggage released, were required to give their note to the appellants for seventeen dollars in payment of the balance due upon their room rent. It is obvious that this did not settle the damages which they had sustained on account of the loss of their property.

"The common-law rule applicable to these facts is aptly stated in *Crapo v. Rockwell*, *supra*, in which the case the court, at page 1123, of 94 N. Y. Supp., and page 2

of 48 Misc. Rep., says: 'The strict rule of the common law has declared for centuries, and still declares, that an innkeeper is the insurer of the property of his guest, and liable for its loss for any cause whatever, unless such loss occurs from the neglect of the guest or the act of God or the public enemy.' The appellants sought exemption from the liability by virtue of the provisions of section 5977, *Balinger's Ann. Codes & St.*, which provides: 'No innkeeper who constantly has in his inn an iron safe or suitable vault in good order, and fit for the safe custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion, and who keeps a copy of this section, printed by itself in large, plain Roman type, and framed, constantly and conspicuously suspended in the office, bar room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary-sized plain Roman type,

of baggage, and the hand bag with its contents was missing. It had been lost while in charge of the porter to whom it was delivered or in the custody of other servants of the defendant. The defendant had complied with the Innkeepers' Act of this State, and the plaintiff never gave any notice to the defendant that the hand bag contained the articles shown in the stipulation, and the defendant had no notice of such contents or the value of the bag.

An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and, if the property is lost, all that is necessary to make a *prima facie* case is to show the relation of innkeeper and guest and the loss. The burden is then cast on the innkeeper to exonerate himself, and this he may do by showing that there has been no negligence on the part of himself or his servants, or that the loss was caused by the personal negligence of the guest or some one for whom the guest was responsible, or by superior force. The loss of the goods of the guest while at an inn raises a presumption of negligence on the part of the innkeeper or his servants, and prior to the passage of the Innkeepers' Act guests at an inn were not bound to deposit money or valuables with the innkeeper,

posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe or vault, and such innkeeper has refused or neglected to receive and deposit such property in his safe or vault, and to give such guest a receipt therefor: Provided, That all doors to rooms furnished to guests shall be provided with slide-bolts inside of such rooms on all doors; otherwise he shall be liable; but every innkeeper shall be liable for any loss of the above enumerated articles by a guest in his inn, when caused by the theft of negligence of the innkeeper or any of his servants.' The evidence offered by the appellants to bring themselves within this exemption was clearly insufficient. They did

not keep or have in their inn an iron or any safe, or a suitable or any vault. The only place they had provided for keeping valuables was a closet in their sleeping room, containing a wooden box. Nor did they post in the sleeping rooms or office a copy of the law which we have quoted, printed by itself. The innkeeper cannot exempt himself from liability except upon a strict compliance with the statute, and the notice required by the statute must be given exactly as provided. 22 Cyc. 1086."

See also Vols. 1-20 AM. NEG. REP. (1897-1907) for cases relating to the liability of innkeepers for loss or theft of personal effects of guests.

See also, the AMERICAN NEGLIGENCE DIGEST (1909 edition), title INNKEEPER, where the cases relating to liability of innkeepers as reported in the series of AMERICAN NEGLIGENCE REPORTS (1897-1907) are collated.

although they knew that an iron safe was provided for that purpose. *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302. The Innkeepers' Act (Laws, 1861, p. 133) provides that every innkeeper who shall keep an iron safe in good order and suitable for the purpose and shall post the notice provided for shall not be liable for any money, jewelry, or other valuables, of gold, silver, or rare and precious stones that may be lost, if the same are not delivered to the innkeeper, his agent, or clerk for deposit, "unless such loss shall occur by the hand or through the negligence of the landlord or by a clerk or servant employed by him in such hotel or inn." It is contended that the court erred in overruling the demurrer to the evidence for the reason that this Act exempted the defendant from liability. No matter what the effect of the Act might be, the court did not err, since the bag and part of its contents were not within the terms of the Act. But the Act did not apply to this case, for the reason that the loss occurred by the negligence of the porter or servant of the defendant, and the statute affords no protection against such a loss. The Act further provides that nothing contained in it shall apply to such an amount of money and valuables as is usual, common, and prudent for any guest to retain in his room or about his person, and the question whether the amount of jewelry and valuables in the hand bag came within the proviso and were such an amount as is usual, common, and prudent for a guest to retain in his room or about his person was purely a question of fact. It could not be raised by the demurrer, which presented nothing but a question of law, and the question of fact has been finally settled by the judgment of the Appellate Court. The Innkeepers' Act did not apply to the stipulation at all. The stay of the plaintiff at the defendant's hotel as a guest was about to terminate, and, if she was responsible for the care and protection of the jewelry up to that time for the reason that she did not deposit it with the defendant, the property could not remain in the iron safe while she was taking her departure from the hotel with it. When she packed her goods to leave the hotel and gave them in charge of the porter sent to receive them, there was no requirement of the statute that they should be on deposit in the safe.

The supposed propositions of law submitted to the court were with one exception not propositions of law, but depended upon the conclusion of the court as to matters of fact. The only one which could be termed as a proposition of law was marked by the court "held."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CITY OF CHERRYVALE v. HAWMAN. (TWO CASES.)

Supreme Court, Kansas, May, 1909.

1. MUNICIPAL CORPORATIONS — INJURIES CAUSED BY "MOB" — INSTRUCTION.. — In an action upon the statute making cities liable for injuries done by mobs, an instruction that "a 'mob' is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," is not erroneous because it makes no reference to a determination on the part of those composing the assemblage to resist opposition.
2. CHARIVARI — "UNLAWFUL VIOLENCE" — LIABILITY OF CITY. — Where the members of a charivari party forcibly place a bride and groom in a wagon against their will and draw them up and down the streets, they are engaged in an act of unlawful violence within the meaning of such definition. The fact that they are good-natured and intend no serious harm to any one does not absolve the corporation from liability (1).
(*Syllabus by the Court.*)

ERROR from District Court, Montgomery County.

ACTIONS by Minerva Hawman and Frank Hawman against the City of Cherryvale. There was judgment for plaintiff in each action, and defendant brings error. The facts appear in the opinion. *Judgment affirmed.*

L. P. BROOKS, for plaintiff in error.

A. B. CLARK, for defendants in error.

MASON, J. — Shortly after a marriage had taken place in the city of Cherryvale, a number of men gathered at the house where the bride and groom were staying, placed them in a wagon, and drew them by hand up and down the streets, making proclamation of their nuptials, and introducing them to passers-by in burlesque speeches, attracting a large crowd and occasioning some disorder and tumult. Frank Hawman, nine years of age, was run over by the wagon; his leg being thereby broken. He and his mother each sued the city under the statute making municipalities liable for all damages accruing in consequence of the action of mobs within their corporate

<p>1. <i>Charivari party.</i> In connection with the case at bar, see <i>Gilmore v. Fuller</i>, 198 Ill. 130, 13 Am. Neg. Rep. 38, 65 N. E. 84, in which the Supreme Court of Illinois reviews the authori-</p>	<p>ties bearing on similar actions to that case. Opinion by MAGRUDER, CH. J. See the case reported in 13 Am. Neg. Rep. 38-47.</p>
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limits. Gen. St. 1901, § 2501. The cases were tried together, the plaintiff recovering in each. The defendant prosecutes error.

The most serious question presented is whether the evidence justified a finding that the gathering constituted a mob within the meaning of the statute. The court instructed the jury that "a 'mob' is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property." This definition, which appears to have originated in Abbott's Law Dictionary, is substantially that usually given by the courts and text-writers. 27 Cyc. 812; 20 Am. & Eng. Encyc. of Law, 835; 5 Words and Phrases Judicially Defined, 4548. Its substance was incorporated without objection in the charge in *City of Atchison v. Twine*, 9 Kan. 350. It differs but little from the one asked by the defendant, which read: "A mob consists of an assemblage of many people acting in a violent manner, defying the law, and committing or threatening to commit depredation upon property or violence to persons." Perhaps, however, this requested instruction suggests an element held in New York to be essential, namely, a determination on the part of the persons composing the assemblage to carry out their purpose notwithstanding any resistance encountered. The statute of that State makes municipalities liable for injuries done by "a mob or riot," and the court of last resort, holding that the two words indicate the same kind of disturbance, excepting as to the numbers taking part, has definitely adopted this definition of the latter: "A tumultuous disturbance of the peace by three persons or more assembling together of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful." *Adamson v. New York*, 188 N. Y. 255, 80 N. E. 937. The word "riot" has often been defined, however, without referring either to a purpose to resist opposition or to the inspiring of terror. 24 Am. & Eng. Encyc. of Law, 971; 7 Words and Phrases Judicially Defined, 6240. And the statutory definition in New York omits both these elements, reading thus: "Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any person, or to property, threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot." In *Marshall v. City of Buffalo*, 50 App. Div. 149, 64 N. Y. Supp. 411, it is said:

"This statute (making the city liable for injuries done by a mob or riot) is now substantially the same * * * as the original enactment of 1855. * * * At that time riot was not a statute crime, and it may therefore be presumed that the Legislature had the common-law definition in mind." In Kansas there is, and was when the law here invoked against the city was enacted, a statute in effect defining a riot, for it provided (Gen. St. 1901, § 2269) that: "If three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace, * * * the person so offending on conviction thereof shall be fined in the sum not exceeding \$200." The next section makes it the duty place, "to make proclamation in the hearing of said offenders, commanding them in the name of the State of Kansas to disperse and to depart to their several homes or lawful employments," and if such command is not obeyed to summon aid and enforce it. The Kansas Legislature, in passing an Act the obvious purpose of which is to make municipal officers more vigilant in suppressing unlawful assemblies, must be deemed to have had in mind the language of its own statute in that regard, rather than any one of the several definitions recognized by the common law. We think the instruction given by the court was sufficient for the purpose of the case.

The question therefore narrows down to this: Was there any evidence of a purpose on the part of those engaged in the demonstration which occasioned the injury to employ force in an unlawful undertaking? There was testimony that several of the ringleaders entered the room where the bride was, and taking hold of her made her go with them; that she, seeing that they were going to use force, said that rather than submit to this she would accompany them, and did so. This was some evidence of the use of unlawful violence. If the purpose of the visitors had been to inflict punishment in revenge for some real or fancied wrong, no one would doubt the illegal character of their act. The fact that nothing worse was intended than to subject the victim to embarrassment, annoyance and humiliation in order to provide amusement for the spectators does not change its aspect in the eye of the law. True, the testimony of the bride showed that she cherished no resentment against the perpetrators of the prank, but whether she consented to it at the time was a fair matter under all the evidence for the determination of the jury, and they must be deemed to have found that she did not. They also made a special finding, which was not wholly without support in the evidence, answering in the affirmative the question whether those

who caused the injury disturbed the peace of any one on the streets or along the streets over which the wagon was drawn.

There was clearly some evidence that the persons responsible for the injury to the boy constituted a mob, unless they can escape that designation by the plea that they were acting with perfect good nature and intended no real harm to any one. It is hardly necessary to combat that plea with authorities, and yet cases in point are not wanting. In *Bankus v. State*, 4 Ind. 114, it proved unavailing in a prosecution for a riot; the court saying: "It is said the rioters were in good humor. Very likely, as they were permitted to carry their operations without interruption; but with what motive were they performing these good-humored acts? Not, certainly, for the gratification of Wise and his family. They were giving them what is called a 'charivari,' which Webster defines and explains as follows: 'A mock serenade of discordant music, kettles, tin pans, etc., designated to annoy and insult.'" In *Gilmore v. Fuller*, 198 Ill. 130, 13 Am. Neg. Rep. 38, 65 N. E. 84, one member of a "charivari" party was accidentally shot by another. He sought to recover damages, but was denied relief on grounds thus stated: "The enterprise in which they were both engaged at the time of the injury was an unlawful one. The fact that it is called a 'charivari' does not make it any the less unlawful. The assemblage around the house of Daniel Hirsh in the nighttime, there engaged in disturbing a family in which a wedding had occurred, was an unlawful and illegal assemblage, and not only so, but a gathering of illegal trespassers. They were all, including both plaintiff in error and defendant in error, engaged in the same unlawful enterprise." In *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, damages were sought against the subject of the "charivari" for having shot one of its perpetrators. The plaintiff's counsel was permitted in the examination of jurymen as to their qualification to ask whether they had any prejudice against that form of amusement. In expressing its view that such question should not have been allowed, the court said: "Every good, law abiding citizen must and does condemn such unlawful and riotous assemblies. They are wholly indefensible in law and morals, and are reprobated by every well-disposed person. With the same propriety a juror called upon to try a man charged with a criminal act might be asked if he had or entertained any bias or prejudice for or against crime or criminals." In *State v. Adams*, 78 Iowa, 292, 43 N. W. 194, in reversing a conviction for manslaughter, the court used this language: "The party assembled in the night when the tragic affair took place is called a 'charivari.' Its object is about as barbarous as

the pronunciation of its name. Whatever toleration it once had has long since passed away. Even when in vogue it was often attended with violence and bloodshed. If it ever was allowable to direct a jury that such an assemblage, with all its tumult and confusion, was not a great provocation to those annoyed and insulted by it, that time has passed away."

Complaint is made of the denial of a motion directed against a defective summons; but as a sufficient summons was afterwards issued and served, the ruling became immaterial. Testimony that the mother of the injured boy was a widow was competent in her own case, and therefore the objection made to it is unfounded. The court struck out a portion of each of several interrogatories to the jury prepared by the defendant; but no material error was thereby committed for this reason, among others, that the questions as they stood were compound. An instruction refused with regard to the extent of the injury was sufficiently covered in the general charge.

No error is discovered in the rulings complained of, and the judgment is affirmed. All the Justices concur.

THOMASON v. KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.

Supreme Court, Louisiana, January, 1909.

1. FIRE SET BY LOCOMOTIVES—LIABILITY OF RAILROAD COMPANY.—A railroad company, on certain terms and conditions, constructed a spur track on its own property, but adjoining a planing mill belonging to the plaintiff. In that contract, the plaintiff agreed to release the company from any and all liability for property destroyed by fire communicated by locomotives operating on said track or otherwise while engaged in work connected with the use of said track, under that agreement. The railroad company was not, under the clause of the agreement, relieved from liability for property destroyed by fire occasioned by sparks emitted from one of its locomotives while on the main track not engaged in work connected with the use of the spur track (1).
2. FIRE—SPARKS FROM LOCOMOTIVES—BURDEN OF PROOF.—It being shown that the fire by which plaintiff's property

1. For actions arising out of damage to property caused by "Railroad fires," see Vols. 1-20 AM. NEG. REP.

See also the AMERICAN NEGLIGENCE

DIGEST (1909 edition), title "Fire," article 1, where "railroad fire cases" reported in Vols. 1-20 AM. NEG. REP. (1897-1907) are collated.

was destroyed was caused by sparks emitted from one of the defendant's locomotives then on the main line, the defendant carried the burden of proof to show that the locomotive was then engaged in work connected with the use of the spur track.

3. BUILDING DESTROYED BY FIRE SET BY LOCOMOTIVE.— EVIDENCE.— When a building, near a railroad track is destroyed by a fire occurring a few minutes after a locomotive emitting sparks has passed opposite to it, and sufficiently near for the sparks to have communicated the fire, these two facts furnish the legitimate basis for presumption that the fire was occasioned by the sparks in the absence of any other assignable cause.
4. APPEAL AND ERROR—QUESTIONS OF FACT.— If there be testimony in the record which if believed would justify the conclusions of the trial judge touching a certain fact, conclusions in respect to that fact will be adopted, unless manifestly erroneous.
(*Syllabus by the Court.*)

APPEAL from First Judicial District Court, Parish of Caddo.

ACTION by W. J. Thomason against the Kansas City Southern Railway Company and others. From a judgment for plaintiff, defendants appeal. The facts are set out in the opinion. *Judgment affirmed.*

ALEXANDER & WILKINSON, for appellants.

EDGAR WILLIAMSON SUTHERLIN and THOMAS CHARLES BARRET, for appellee.

STATEMENT OF THE CASE.

NICHOLLS, J. — Plaintiff seeks in this suit to obtain a judgment in solido against the Kansas City Southern Railway Company, and the Kansas City, Shreveport & Gulf Railway Company for \$6,633, with legal interest from judicial demand.

The demand is one sounding in damages for the alleged destruction of plaintiff's planing mill and machinery appliances, and lumber and building materials therein, and stacked on the planing mill yards situated at or near Vivian station in Caddo parish, on the line of railroad, on September 14, 1906.

The petition averred that the line of railway through the parish of Caddo was built and equipped, and is owned by, the codefendant, Kansas City, Shreveport & Gulf Railroad Company, and that it was controlled, managed, and operated by the other defendant, under some sort of contract and agreement or arrangement between them which is in the possession of said two railway companies, and that plaintiff is therefore unable to state the exact substance, purport, and contents of the agreement between said two railway companies,

under which the one company was managing, controlling, and operating the line of railroad owned by the other company.

The legal question involving the solidary liability of the two companies for the amount sued for was eliminated from any further discussion or investigation in the consideration of the case. For it was admitted at the inception of the trial that if either company was liable, the other was also liable, as follows:

"It is admitted by the defendants in this case that the line of railway referred to in plaintiff's petition is owned by the Kansas City, Shreveport & Gulf Railway, and was operated during the year 1906 by the defendant the Kansas City Southern Railway Company, and that if either of said companies, defendants, is liable for the damages claimed in plaintiff's petition, the other company is also liable in solido therefor."

Plaintiff alleges in his petition, in substance, as follows:

That during the year 1906 he owned and operated a sawmill plant, buildings, machinery, fixtures and appliances for the sawing and manufacture of lumber and planing, dressing, matching, and finishing the same, all of which were situated on or near the tracks or side tracks of said line of railway, and which is above and north of, and a short distance from, Vivian depot or station; and

That on September 14, A. D. 1906, in the forenoon of the said day, the Kansas City Southern Railway Company, through the torts, faults, carelessness, and negligence of its officers, agents, servants, and employees in charge of, managing, controlling, and operating the locomotive and engine attached to and propelling a train of freight cars on said line of railway, and passing and moving by or near to his said sawmill and planing mill, set fire to said sawmill and planing mill, and the same, with the buildings, fixtures, and tools, appliances, and improvements pertaining thereto, together with a considerable amount of manufactured lumber and other personal property and materials, located and stacked there on the mill yards awaiting shipment, were set on fire and that all of said property was thereby totally destroyed and consumed by fire, and the same was a total and complete loss to plaintiff; and

That the destruction of said property by fire, as aforesaid, was not due to any fault or negligence on his part, but that the fire originated and was created and set out and communicated to said property, whereby it was totally consumed and destroyed, as aforesaid, through the torts, faults, and carelessness and gross negligence of the officers, agents, and employees of said Kansas City Southern Railway Company; and

That said freight train, controlled and operated by the servants and employees of said Kansas City Southern Railway Company, was drawn and propelled by said locomotive and engine, using steam as the motive power, the steam being generated and produced by fire, which was kept and maintained burning in said moving engine or locomotive which was moving, drawing and propelling said train of freight cars; and

That plaintiff's sawmill and planing mill were situated and located adjacent to, or in close proximity to, the main track of said railway, or to the right of way thereof, and not more than eighty feet distant from said main track of said line of railway; and

That said locomotive and engine used for drawing and moving and propelling said train of freight cars, while moving and passing on the main track of said line of railway adjacent and opposite to, and in close proximity to, plaintiff's said sawmill and planing mill, emitted, discharged, blew out, and threw out cinders, sparks, and fire from said engine or locomotive, and the smokestack thereof, and thereby set fire to plaintiff's mills, roofs, sheds, or buildings thereof, or to lumber or other materials adjacent and in close proximity thereto, and fire was thereby communicated to said planing mill, its roofs, sheds, buildings, and improvements, and to the manufactured lumber on the yards of the planing mill and tramways and on the yards of the sawmill and to the sawmill, its sheds, roofs, buildings, and improvements, machinery, fixtures, and appliances adjacent and attached and connected with the same and in close proximity thereto, and that all of said property was totally destroyed and consumed by fire; and

That said engine or locomotive was not efficiently or properly constructed, and was not supplied or equipped with such scientific improvements and proper and necessary appliances as would have prevented the discharge and emission of cinders, sparks, and fire therefrom, as aforesaid, and the consequent setting out of fire to, and the destruction of, his said property by fire, as aforesaid; and

That said engine or locomotive was not provided, supplied, or equipped with an adequate and sufficient spark arrester, and that the pretended spark arrester thereon was in bad condition and in a bad state of repair, and was old, dilapidated, torn, broken, and worn, and the body or portion thereof separating and connecting the small meshes or holes therein for the discharge through the same of smoke and steam were in many places worn asunder, and broken away, so that there were large holes in said pretended spark arrester through which large cinders, sparks, and fires were emitted, discharged,

thrown out and blown out through the said holes in said pretended spark arrester, and through and out of said smokestack; and

That on account of the worn, torn, and broken condition of said pretended spark arrester, and its condition and bad state of repair, as aforesaid, it was not adequate or sufficient to prevent the discharge, emission, and escape of cinders, sparks, and fire from said locomotive and engine and the said smokestack thereof; and

That at the time of said fire it was a dry season, there having been no rain or moisture in that locality, and in that place, for several weeks prior to that time, and the ground and combustible materials thereon at that place, and the buildings, sheds, roofs, and lumber, such as were destroyed as aforesaid, were very dry and quick and easy to ignite and burn; and

That on the day and at the time his said property was destroyed by fire, in the forenoon on the 14th of September, 1906, it was a windy day, and the wind was high, and blowing with considerable force and velocity, and blowing from the direction of said main track of said railway on which the locomotive and engine moved and passed, and in the direction where said planing mill, sawmill, and other property destroyed by fire, were situated and located, as aforesaid; and

That the servants and employees operating the locomotive at the time the fire was set out, whereby plaintiff's property was destroyed did not control, manage, and operate the same with skill, prudence, or caution, but operated it at the time negligently and carelessly; and

That at the time while the locomotive was passing and moving on the main track in front of, and opposite to, plaintiff's property, the servants and employees in charge of and operating said locomotive were carelessly and negligently using an unusual and unnecessary force, quantity, and volume of steam, whereby an unusual quantity and amount of cinders, sparks, and fire were discharged, driven, and blown out from the locomotive and smokestack thereof with great and unusual force, and to great and unusual distance; and

That the locomotive which caused the fire and the destruction of plaintiff's property on account of its bad and improper construction, and the bad condition and bad state of repair of the spark arrester, and on account of the negligent, careless, and improper handling and operation thereof, had habitually, about the time plaintiff's property was burned, and subsequent and prior thereto, thrown out, blown out, and discharged cinders, sparks, and fire therefrom in its movements along said line of railroad, and said locomotive had frequently and habitually scattered fire and set out fires along the line of said

railroad, and which was well known to the officers and agents of said Kansas City Southern Railway Company.

On January 23, 1907, plaintiff filed an amended and supplemental petition correcting the original petition in this: That it was through the error and inadvertence of his attorney that it was alleged that the sawmill, its buildings, sheds, improvements, fixtures, and appliances and lumber on the said sawmill yard were destroyed by fire, when in point of fact the sawmill, its buildings, sheds, improvements, fixtures, and appliances and lumber on the sawmill yard were some distance from the planing mill yard, and separated therefrom, and that the fire was not communicated to the sawmill, its buildings, sheds, improvements, fixtures, and appliances, nor to lumber on the sawmill yard, but that the only property destroyed by the fire was the planing mill, its buildings, improvements, sheds, tramways, fixtures, tools, implements, and appliances, and the lumber stacked in the planing mill and on the planing mill yards.

Defendant, after pleading an exception of no cause of action, denied generally all of plaintiff's allegations. It denied specially that the fire in question was caused by them, or that any of the engines of the defendant Kansas City Southern Railway Company was then, or had been, in a defective condition and averred that it used, on the occasion in question, the latest and best-approved apparatus, without a defect, and that same was carefully handled by an experienced engineer, and it denied that the fire could have been caused by the escape of sparks from its said engine. But, should it be held that said fire was caused by defendants, then and in that event they showed that such fire was caused while the said engine was working in and around and on the switch, which was constructed to plaintiff's plant under a special agreement that defendants should not be responsible for any fires caused thereby, or while working around or thereat, a copy of which agreement is hereto annexed and made a part hereof; that under this agreement it is exempt from any loss or damage which the said plaintiff might have sustained, which exemption it specially pleaded.

The case was tried before a jury, which by a vote of nine to three returned a verdict in favor of the defendant. On application of the plaintiff for a new trial the verdict of the jury was set aside, and a new trial was granted. By subsequent consent the case was tried before the district judge without a jury.

The district court rendered judgment in favor of the plaintiff and against the defendant in solido for the sum of \$6,600, with five per cent per annum interest thereon from the date of its judgment.

The defendants have appealed.

OPINION.

The agreement referred to in the defendant's answer in its tenth section declared that the party of the second part (the plaintiff company) hereby further stipulates and agrees that, in consideration of the agreement herein contained, to be kept and performed by the said railway company, it will and does hereby release the said railway company from any and all liability for property destroyed by fire communicated by locomotives operating on said track, or otherwise, or while engaged in the work connected with the use of said track, under this agreement, and will indemnify, protect, and forever save harmless the said railway company from any and all such claims, liabilities, damages, or claims for damages. The said party of the second part hereby assumes all risks of fire caused as aforesaid, and all liability for property destroyed by fire caused by or contributed from locomotives operating upon said track, or engaged in work connected with the use thereof. Any person or corporation having insurance against fire on property so destroyed by fire shall upon payment of such insurance, have only the same rights as insured has under this agreement. Said second party hereby further agrees to release, and does hereby release, the said railway company from any and all liability for damages for any injuries which may occur or be done to the property of said second party by the said railroad company, or its employees while operating locomotives and cars upon said track, and under this agreement, whether said property be loaded upon the cars or not.

The following questions are submitted to this court for decision:

1. Did or did not sparks from one of the locomotives of defendant companies cause or occasion the fire by which the property of the plaintiff, near Vivian depot, was consumed and destroyed?
2. If it was so destroyed, where was the locomotive when such sparks escaped from it, and what was it, at that time, engaged in doing?
3. If plaintiff's property was destroyed by a spark escaping from one of defendant companies' locomotives, would the defendant companies be released from their liability for such act by reason of the terms and conditions of the written agreement, pleaded in defendants' answer, if, but for said agreement, they would be liable?
4. If defendants are liable in damages for that act, what is the amount for which they are liable?

Plaintiff's planing mill, and the other property belonging to it, for which he seeks to recover damages for loss by fire, was situated in

the vicinity of Vivian depot in Caddo parish, La., near the defendants' railroad tracks. The general direction of tracks at that point was north and south. Plaintiff's planing mill was situated about 300 yards above and north of Vivian depot, near a spur track running out or from the main track in a southwesterly direction and on the east side of that track.

Plaintiff's sawmill was about 180 feet further above the planing mill, and slightly northeast from it, and some distance further from the railroad's track than it was.

On the morning of the 14th of September, 1907, the regular local train plying between Shreveport and Texarkana, drawn by engine No. 140, passed Vivian going north from Shreveport to Texarkana. When that train reached Vivian, there were three loaded cars on plaintiff's short spur track leading from the main track alongside of the tramway or loading platform of plaintiff's mill.

When the local train reached Vivian depot, the agent informed the conductor that there were three loaded cars standing on the spur track, which should be taken out and put on the main track for transportation. The engine and three cars were cut off from the passing track at Vivian, and one empty car thereon was coupled thereto, and the engines and cars attached were pulled up above the mill spur and backed down and coupled up with the three loaded cars then on the mill spur, and they pulled off the short spur to the main track, and the engine with the loaded cars which were pulled in from Vivian, and the three loaded cars which were taken off from the spur track, were backed down to the Vivian depot. At that place, after some switching and readjustment of the train, it pulled out from Vivian, and went north on its regular trip to Texarkana, going beyond, and passing on its way, the junction of the main track with the spur track, the train being pulled by engine No. 140. A short time after it had left Vivian on its way to Texarkana (the time being estimated from ten to fifteen minutes) plaintiff's planing mill situated near the spur track was discovered to be on fire, and was burned to the ground, together with other property.

The plaintiff contends that it was on the final departure of this engine and cars from Vivian, and when on its way to Texarkana, on the main track and on its regular trip to Roma, that sparks were thrown out from the engine, while passing opposite to the planing mill, setting the mill on fire and causing it to be destroyed; that the distance from that point to that where the fire was first seen was only about sixty feet; that the wind was then blowing towards the northwest away from, and not towards, the plaintiff's planing mill;

that there was no other cause assignable for the fire; that the spark arrester on the engine was defective, and had repeatedly set fire to buildings and fences beyond its right of way; that the short interval between the passing of the engine and the discovery of the fire gave rise to a legal presumption of cause and effect.

Defendant denies that the fire was caused by sparks from its engine at any point, but maintains that, should the fire have been caused by them, they were not thrown out after the train had finally left Vivian and was on its regular trip to Texarkana.

Both parties concede that the locomotive at no time went upon the spur track, but from its position on the main track pulled the cars out which were on it. It contends that when the engine left Vivian to go to the spur track, it had no other purpose than to take from it the loaded cars which were upon it and place them on the train, and therefore, when the engine had taken them off, its return to Vivian became necessary, and became part of work done by it in connection with the spur track, and solely because of such work.

Defendants ascribe the burning of plaintiff's property to fire from burning shavings (or sparks from the same), which shavings had been set fire to by the plaintiff at a point near the railroad tracks, and which was communicated from that point to plaintiff's planing mill. Plaintiff meets this theory by evidence ending to show that the shavings referred to were few; that they had been set fire to the day before; that the fire from the same had been entirely extinguished, but, if not entirely extinguished, it consisted of embers covered by ashes, from which sparks could not be thrown out; that the space between the spot where the shavings had been burned was ground which had been cleared off, and there was nothing through which fire could be communicated to plaintiff's property; that had the fire from the shavings been communicated to plaintiff's property it would have started at the north end of the planing mill, and not at the southwest end of the building, and with no smoke visible until the fire at that end had broken into flame; that the distance from the spot where the shavings were burnt to plaintiff's buildings was — feet away in a northerly or northeasterly direction from them; that defendant itself contended that the wind at the time was from the south to the north; that between the place where the shavings had been burned and the plaintiff's buildings there were high piles of lumber, to which the fire would have been first communicated and shown itself.

The evidence was conflicting as to the direction of the wind at the time of the fire, but all parties agree that it was then blowing from

the south towards the north. The disagreement between the witnesses on the point was as to whether it was blowing towards the northwest or towards the northeast. We do not think, under the evidence as a whole, that the fire at plaintiff's mill could be attributed to having been communicated from the burning shavings. We think the distance of a locomotive from a point opposite to the place at which plaintiff's mill was set on fire was sufficiently close to have authorized the court to connect the emitting of a spark from the locomotive with the immediately succeeding fire at plaintiff's planing mill. Several persons testified to fires having been communicated, from sparks emitted from defendant's locomotive, to objects beyond the right of way, at distances varying from twenty-five feet to 180 or 200 feet and that sparks from engine No. 140 had done so.

This court, in *Brady v. Jay*, 111 La. 1074, 36 So. Rep. 132, recognized that sparks from locomotives could communicate a fire to a building 150 feet away. We will leave for a moment the question as to whether the evidence warranted the finding by the trial judge that the fire was caused by a spark from the locomotive of the defendants, and pass to the question as to where the locomotive was, and what it was doing, when the sparks were emitted, on the assumption that they did cause the fire which destroyed plaintiff's property. On that assumption we think where there is conflict in the testimony as to the point at which the sparks were emitted from defendant's locomotive, and as to what the locomotive was then engaged in, that the burden is on the defendant to establish affirmatively the state of facts which would entitle it to claim exemption (under the written contract which defendant set up in its answer) from liability.

Concerning the scope of that agreement, plaintiff, as we have stated, contends that the agreement does not release, or purport to release, defendant companies from liability to plaintiff for fires communicated to his property from its locomotive, in the general operation of the railroad at Vivian depot, or other places, and in no way connected with the use of the spur track for the purpose provided in the agreement.

In the third edition of *Thompson on Negligence*, published in 1901 (section 2237), the author, under the heading *Railway Companies May Contract Against Liability for Fires Communicated by Their Locomotives*, says:

"There is no principle of public policy which prevents a railway company from entering into a contract with a property owner by an instrument under seal, or by an instrument founded on a good consideration, whereby it shall be exonerated from liability to the prop-

erty owner for damages caused by fire communicated from its locomotives, even though caused by the negligence of its servants, provided the agreement contains no provision which in no way involves the relation of the railroad company as a common carrier to the other contracting party or to the public. For example, a stipulation in an instrument whereby a railway company leased to another a strip of land upon its right of way, to be used for a storage warehouse, by which the railroad company is exempted from any liability for damages caused by fire emitted from its locomotive engines, even though caused by the negligence of the company or its servants, has been held valid. So where, in such an instrument of lease, the lessee assumes, 'all risks of fire from any cause whatever, the risk of fire due to the negligence of the lessor or its servants is assumed by, and cast upon, the lessee. The rule is the same where there is a statute making railroad companies absolutely liable for all damages caused by negligent fires set out by their locomotives. It has been well said that the public has no interest in the question whether the railroad company or a lessee who erects buildings on the right of way shall bear the loss resulting from negligence of the railroad company's servants so as to raise any question of public policy in respect to a contract exempting the company from such liability. But such a clause in a lease of ground for the purpose of erecting a building for the storage of grain does not extend so far as to exempt the railroad company from liability for the destruction, by fire communicated from its locomotives, of grain stored in the building owned by persons who are not parties to the lease. Where the owner of cotton stored in a warehouse erected by him on the land of a railroad company has entered into a contract with the company releasing it from liability for damages from fire, an insurance company which has insured the cotton for the benefit of the owner, and which has paid the loss, cannot, on the theory of subrogation, have an action against the railroad company to recover the amount so paid. So, where a railroad company occupied under a statute the position of an insurer against loss by fire communicated by its engines, it was not liable for loss occasioned thereby to partnership property contained in a grain building owned by one of the parties who had, by contract with the company, assumed all risk of loss by fire.'"

The text of this section refers, in a note at the bottom of the page, to the following cases in support of the text: *Griswold v. Ill. Cent. Ry. Co.*, 90 Iowa, 265, 57 N. W. 843; *Savannah Ins. Co. v. Pelzer Mfg. Co.* (C. C.) 60 Fed. 39; *Hartford Fire Ins. Co. v. Chicago*,

M. & St. P. Ry. Co. (C. C.) 62 Fed. 904; Id. 70 Fed. 201, 17 C. C. A. 62; Id. 175 U. S. 91, 20 Sup. Ct. 33.

In *Greenwich Ins. Co. v. L. & N. R. R. Co.*, 112 Ky. 599, 66 S. W. 411, 67 S. W. 16, the Supreme Court of Kentucky in 1902, since the publication of the third edition of Thompson, rendered a decision similar to those rendered in the cases cited.

Plaintiff's counsel say that the Federal cases mentioned were all based upon the duty of Federal courts, in matters of local law, to follow the rulings of the Supreme Courts of the different States, and therefore those decisions are not independent original decisions of the Supreme Court of the United States or other Federal courts, on the questions, but rest upon and follow the State court decisions.

The decision in *Griswold v. Railroad Company*, *supra*, in favor of the railway company's exemption, was rendered by the Supreme Court of Iowa on a rehearing, and reversed the one originally rendered.

In the first opinion the court quoted Cooley on Torts (3d Ed.) pp. 1485, 1486, as saying:

"The cases of carriers and telegraph companies have been specially mentioned because it is chiefly in these cases that such contracts are met with. But, although the reasons which forbid such contracts have special force in the business of carrying persons and goods, or of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

It also referred to 86 Va. 975, saying, in *Johnson's Adm'x v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. 829, the administrator sought to recover damages for the death of his intestate, which was claimed to have been caused by the negligence of the railway company. The decedent had been a member of a firm of quarrymen, which agreed with the railway company to remove a certain granite bluff from its right of way. He was killed by a train of the company while he was engaged in doing the work required by the agreement. There was evidence which tended to show that the accident was caused by negligence on the part of the company. It claimed exemption from liability, however, on the ground that the agreement provided that it should "in no way be held responsible for any injuries to or death of any of the members of the said firm, or any of its agents or employees, sustained from said work should such death or injury occur from any cause whatsoever." The court, in commenting on this provision of the agreement, said:

"To uphold the stipulation in question would be to hold that it

was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void. Nothing is better settled, certainly in this court, than that a common carrier cannot, by contract, exempt itself from responsibility for his own or his servant's negligence in the carriage of goods or passengers for hire."

Plaintiff differentiates the cases quoted from the one before the court, on the ground that their building is not on defendants' right of way, nor upon property leased to it by the railway company. They maintain that the companies, in their operations on the main line (general operations not connected with operations on the spur track), defendants, occupied *quoad* the plaintiff the same position as they did to any other person. To that contention we give our assent.

There is conflict in the evidence as to the condition of the spark arrester of engine No. 140 on the 14th of September, while operating at Vivian and its vicinity. We are satisfied under the evidence that it was defective at that time, and that defendant companies were negligent in making use of it in the condition that it then was; that it was, at the time of passing plaintiff's planing mill, throwing out sparks to an extent that a spark arrester in good condition would not have allowed; that the fireman improperly and incautiously increased the danger of the situation by increasing the fire of the engine just before reaching plaintiff's mill, which was not many feet distant from the track, and in sight.

We return now to the question as to whether sparks from the spark arrester on the defendants' engine caused the fire. There is no other attributable cause for it. As we have stated, we cannot accept the theory of the defendant that it was occasioned by the burning shavings. A locomotive passing and emitting sparks (at a distance from buildings which have been shown and have been recognized as sufficiently near for those sparks to have been the means of communicating fires) and a fire occurring at a building directly opposite, just after the passing of the locomotive, furnish facts on which to base a reasonable presumption that the sparks caused the fire. Defendant urges that the direction from which the wind was blowing precludes the idea that the sparks reached the building.

The testimony is conflicting on that point. The fickleness of the wind is proverbial; it changes frequently and rapidly at the same place. There is evidence in the record which, if believed, would justify the conclusion reached by the trial judge.

We are not able to say in the present case, under the evidence adduced, that he manifestly erred.

If the fire was in fact caused by sparks from the defendants' engines, we do not understand them to seriously contest the extent of the loss suffered.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment of the district court be, and the same is, affirmed.

Rehearing denied, February 15, 1909.

PERKINS v. OXFORD PAPER COMPANY.

Supreme Judicial Court, Maine, March, 1908.

1. DEATH — ACTION — "IMMEDIATE DEATH." — Rev. St. 1903, c. 89, § 9, provides as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony." *Held*, that this statute was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness, following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial (1.)
2. MASTER AND SERVANT — INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK. — When there is a comparatively safe and likewise a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of injury which its use entails (2.)

1. "Immediate," and "Instantaneous" Death. — See *Conley v. Portland Gaslight Co.*, 96 Me. 281, 12 Am. Neg. Rep. 461, 52 Atl. 656, and *Sawyer v. Perry*, 88 Me. 42, 15 Am. Neg. Cas. 291, where the phrases "immediate" and "instantaneous" are construed.

2. Assumption of risk. — See AMERICAN NEGLIGENCE DIGEST (1909 edition), titles ASSUMPTION OF RISK, MASTER AND SERVANT, RISK OF EMPLOYMENT, where the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) are collated.

3. DEATH—EMPLOYEE STRUCK BY PROJECTING OBJECT WHILE PASSING UNDER MOVING BELT—IMMEDIATE DEATH—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.—The plaintiff's intestate was employed as an engineer in the defendant's mill, and had been so employed for about five years prior to his death. In attempting to pass under a large and rapidly moving belt shackled with "Jackson hooks," so called, the nuts and bolts of which projected about one inch from the surface of the belt, he was struck on the head by the hooks, and knocked to the floor in an unconscious condition, and remained unconscious until his death, seventy-five hours later. The plaintiff's administrator then brought an action against the defendant under the provisions of Rev. St. 1903, c. 89, § 9. The defendant contended, 1, that this form of action could not be maintained as a matter of law because the death was not immediate; 2, that the plaintiff's intestate was guilty of contributory negligence.

Held, 1, that the action was properly brought under the statute, although the plaintiff's intestate survived the accident seventy-five hours; 2, that the plaintiff's intestate was guilty of contributory negligence, as there was no necessity for his passing under the belt at a point where he was liable to be struck by it (3.)

(Official.)

EXCEPTIONS from Supreme Judicial Court, Oxford County.

ACTION on the case by Frank C. Perkins, administrator of the estate of Arthur N. Perkins, deceased, against the Oxford Paper Company. Verdict for plaintiff for \$3,250, and the defendant filed exceptions and moves to have the same set aside. The facts appear in the opinion. *Motion sustained, and verdict set aside.*

"Action on the case brought under Rev. St. 1903, c. 89, § 9, by the plaintiff as administrator of the estate of Arthur N. Perkins, deceased intestate, for the benefit of the widow of said Arthur N. Perkins and against the defendant corporation to recover damages for the death of the said Arthur N. Perkins; such death having been caused by the alleged negligence of the defendant corporation. The declaration in the plaintiff's writ is as follows: "In a plea of the case, for that the defendant on the 23d day of November, 1906, was the owner and operator of a certain mill, with its machinery, appurtenances and appliances, situated in Rumford, in the county of Oxford, and State of Maine, used for the manufacture of pulp and paper. And the plaintiff avers that it was then and there the duty of said defendant to provide a safe and suitable place for its employees

3. *Machinery and Projecting objects.*—For accidents similar to that in the case at bar, see Vols. 1-21 AM. NEG. REP. See also AMERICAN NEG-

LIGENCE DIGEST (1909 edition), titles DEFECTIVE APPLIANCES, MACHINERY, ETC.

to perform their labor, and also safe and suitable machinery and appliances. And the plaintiff avers that the said defendant on said 23d day of November was unmindful of its duty in this behalf, in that it then and there unlawfully and negligently failed to provide either a safe and suitable place for his intestate to perform his labors, or safe and suitable machinery or appliances, as required by law. And the plaintiff avers that as a part of the machinery of said mill owned and operated by the defendant as aforesaid in an engine numbered 4, with all of its appurtenances and appliances, about which it was the duty of the plaintiff's intestate then and there to be employed. And it is averred that as a part of the appliances of said mill, then and there owned and operated by the said defendant, was a large belt known as the 'speed' or 'power' belt, which was then and there fastened or connected with a large wheel or pulley on said engine, and then and there extending to the main shaft in said mill, and which moved with great rapidity. And it is averred that the defendant then and there unlawfully, carelessly, and negligently connected the two ends of said belt by means of bolts, clasps, and nuts, a system of connection known to the mill trade as 'Jackson hooks;' that the said defendant then and there unlawfully, carelessly, and negligently allowed said bolts by which the said belt was then and there connected to project a great distance from the belt. And the plaintiff avers that on the said 23d day of November, and for a long time prior thereto, his intestate, Arthur N. Perkins, was then and there employed by the said defendant for hire, in its mill, as aforesaid, as engineer, and that it was the duty of the plaintiff's intestate to labor around and about the said engine, its appurtenances and appliances. And the plaintiff avers that while his intestate was then and there employed about said engine in the regular performance of his duty, and while in the exercise of due care and caution, and without fault on his part, due wholly to the unlawful carelessness and negligent manner by which the said belt was then and there connected, by the said defendant, your plaintiff's intestate was then and there suddenly and forcibly struck in the head by one of the bolts aforesaid, then and there received injuries from which he then and there immediately died. Whereby Lula Perkins, wife of the said Arthur N. Perkins, for whose benefit this action is brought, suffered great loss and damage, and whereby and by virtue of the statute in such case made and provided an action has accrued to the plaintiff in his capacity as administrator, as aforesaid, to have and recover of the said defendant said loss and damage for the benefit of the said Lula Perkins, yet the said defendant, though often requested, has

not paid the same, but neglects and refuses so to do, to the damage of said plaintiff (as he says) in the sum of \$5,000, which shall be made to appear, with other due damages, and have you there this writ with your doings therein."

ARGUED before EMERY, C. J., and WHITEHOUSE, SAVAGE, SPEAR and CORNISH, JJ.

MATTHEW MCCARTHY and WM. H. NEWELL, for plaintiff.

BISBEE & PARKER, for defendant.

CORNISH, J. — This is an action on the case brought under section 9 of chapter 89 of the Revised Statutes of 1903 for the benefit of the widow of Arthur N. Perkins, the intestate, for the death of said intestate, caused by injuries received by him while in the employment of the defendant corporation. The case is before this court on motion and exceptions by defendant.

There was little conflict of testimony. The undisputed facts are as follows: Arthur N. Perkins at the time of the accident was thirty-two years of age, and had been employed by the defendant as an engineer for about five years. He had charge of engines Nos. 3 and 4 and their appurtenances, situated in machine room No. 2. These engines and the shafting and pulleys connected therewith were similar in construction. A large belt known as the "step speed belt" extended from the pulley on the front cone shafting (said pulley being set between piers on the floor) to the machine shafting at the upper part and rear of the room. The lower side of this belt moved from the machine shafting downward on an incline toward the pulley, and its height from the floor varied from a few inches at the pulley to eight or nine feet at the machine shafting. The belt was eighteen inches wide fastened together with "Jackson hooks," so called, the nuts and bolts of which projected about one inch from the surface, and, when the machinery was in operation, as at the time of the accident, the belt moved at the rate of a mile a minute. The distance on the floor from the center of the front cone shafting to a point beneath the center of the machine shafting was about thirty feet.

Standing by the front cone shafting, and looking toward the belt and the rear wall, one would see at the left of the belt and about eight inches from it two upright steel columns, the nearest nine feet distant and the furthest twenty-one. Between the furthest column and the rear wall, a distance of about nine feet, but a little toward the left, was a pump, so placed that there was a clear space of three and a half feet between it and the column. At the left of these columns was a wide and unobstructed passageway.

On the other side, at the right of the speed belt and about ten feet from it, was a crossbelt connecting the front cone shafting with the rear cone shafting. The engineer at times, in the course of his duty, had occasion to visit this intervening space, and this could not be reached from the broad passageway on the left without going under the speed belt at some point. At no point between the first and second columns could a man cross without stooping, but at any point beyond the second column stooping was unnecessary, as the height of the belt varied from six feet three inches to nine feet. At the time of the accident Mr. Perkins started to go beneath the rapidly moving belt at a point between the two steel columns where the height of the belt above the floor was four feet nine and three-quarter inches. His height was five feet four inches. As he crossed, he stooped, but not enough. His head struck by the hooks in the belt, and he was knocked to the floor in an unconscious condition. The accident occurred at about ten A. M., November 23, 1906, and he remained unconscious until one P. M. on November 26th, a period of seventy-five hours, when he died.

I. FORM OF ACTION. — The first point raised by the defense is that this action cannot be maintained as a matter of law because death was not immediate.

It is admitted that the intestate survived seventy-five hours after the injury, taking nourishment that was administered, but was in an unconscious condition during the whole period, so that even an operation upon the skull was performed without the use of anæsthetics. The question is raised sharply whether sections 9 and 10 of chapter 89 of the Revised Statutes of 1903 should be construed to cover such a case. The history of this legislation and the construction put upon it by the court are interesting and important. At common law no value was put upon human life to be recovered in the way of damages. At common law, too, a right of action to recover damages for personal injuries did not survive. But by an early statute, now Rev. St. 1903, c. 89, § 8, those actions that could be maintained at common law for personal injuries were made to survive, and could be prosecuted by the personal representatives whether an action had been brought in the lifetime of the injured party or simply the cause of action had accrued and the injured party had died before the suit was actually brought.

A remedy by indictment against steamboats and railroads in case the life of a person was lost through the carelessness of the respondent's servants was provided by chapter 70, p. 59, Pub. Laws 1848, and the limit of recovery extended to \$5,000 by chapter 161,

p. 159, Pub. Laws 1855. This statute was construed to cover cases of immediate death only. *State v. Maine Cent. R. Co.*, 60 Me. 491, 15 Am. Neg. Cas. 294. That case came before the court on a demurrer to the indictment, which alleged that the accident occurred on June 27th, and death ensued on June 29th, but did not state whether the injured party was in a conscious or unconscious condition during that time, and the court did not attempt to define the word "immediate" as used in that connection.

In *State v. Grand Trunk Ry.*, 61 Me. 114, 15 Am. Neg. Cas. 294, a similar proceeding by indictment, the court in reaffirming the essential elements of immediate death also call attention to the conscious condition of the sufferer in these words: "In this case the evidence shows clearly and beyond a reasonable doubt that Pullen, the person injured, did not die immediately. He not only survived several hours, but during most of the time was conscious and able to converse intelligently. A right of action, therefore, accrued to him, which, upon his subsequent death, descended to his personal representatives."

A similar statute giving remedy by indictment was construed by the Supreme Court of Massachusetts not to be limited to cases where death was instantaneous. *Comm. v. Metropolitan R. R. Co.*, 107 Mass. 236.

Chapter 124, p. 135, Pub. Laws 1891, entitled "An Act to give a right of action for injuries causing death" extended, in section 1, the remedy to a civil action in these words: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony." Rev. St. 1903, c. 89, § 9.

It will be noted that in this statute neither the word "instantaneous" nor "immediate" is used. The test is not life or death, as was applied by the Supreme Court of Massachusetts, in construing the statute relating to the survival of actions, in *Kearney v. Boston & W. R. Co.*, 9 Cush. (Mass.) 108, 15 Am. Neg. Cas. 452; *Hollenbeck, Adm'r, v. Berkshire R. Co.* 9 Cush. (Mass.) 478, 15 Am. Neg. Cas. 452; and *Bancroft v. Boston & W. Ry.*, 11 Allen (Mass.) 34, 3 Am. Neg. Cas. 765. The statute there under consideration provided that

"the person who causes or the case, for damage to the person, shall be liable to maintain an action, or liable thereto, the same may be maintained by or against his executor or administrator, in the same manner as if he were living." It is similar to section 8 of chapter 10 of the Revised Statutes of 1903 of Maine. The court there said that the only question involved in the construction of this statute was whether the sufferer survived the injury. If he did, a right of action accrued without regard to the consciousness or mental capacity of the sufferer.

A right of action could only survive if it once existed and it could exist if the sufferer survived the injury for any appreciable time. The test was the continuance of life after the accident, and not the length of time nor want of consciousness during that time.

Following this construction, the Massachusetts court in a subsequent case, where the injured party survived ten minutes in an unconscious state, logically held that a cause of action accrued to the intestate in his lifetime and survived to his personal representative, but, as there was no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, further held that only nominal damages could be recovered. *Mulcahy, Adm'x v. Washburn Car Wheel Co.*, 145 Mass. 281, 14 N. E. 106, 15 Am. Neg. Cas. 621.

Counsel for defendant cite these cases as decisive of the one at bar, and claim that the Act of 1891 should be construed with equal strictness, that under the facts here a right of action accrued to the sufferer to be enforced by his personal representative, and that this statutory action cannot be maintained.

This brings us to the construction of the statute of 1891, which is quite different from that of the survival statute before considered. What did the Legislature mean by granting a right of action, although death ensues where the act, neglect, or default is such as would have "entitled the party injured to maintain an action and recover damages in respect thereof" if death had not ensued. We think the plain intent was to give not an empty right of action, but a right that should bring substantial damages, not merely a right to sue but a right to recover.

Prior to its passage, if death was instantaneous, there was no remedy whatever, and if the injury was immediately followed by a comatose condition for a longer or shorter period and that by death, there was no real remedy; for, although the personal representative had a right of action under the survival statute, the damages were

nominal as in *Mulcahey, Adm'r v. Washburn Car Wheel Co., supra*. The right was a husk without the kernel. To obviate this injustice and to grant compensation to the family of the injured party, the Act of 1891 was passed, and a fair, just, and reasonable interpretation of that statute is that it gave relief where no substantial relief existed before, and that includes both injuries producing immediate death where no action could before be brought, and these producing at once a condition of insensibility, continuing without cessation until death, where an action could be brought, but only nominal damages could be recovered.

Whether the unconscious condition continues for minutes or hours or days the reason of the rule still prevails and the statute applies.

The decisions in this State are in harmony with this view. The court held in *State v. Maine Cent. R. R. Co.*, 60 Me. 490, 15 Am. Neg. Cas. 294, and *State v. Grand Trunk Ry.*, 61 Me. 114, 15 Am. Neg. Cas. 294, under the indictment statute, that death must be immediate, without attempting to define the precise meaning of the term. In *Sawyer v. Perry*, 88 Me. 42, 15 Am. Neg. Cas. 291, 33 Atl. 660, which came to this court on a demurrer to the declaration and was the first case under the Civil Act of 1891, the court for the first time defined the meaning of "immediate" in these words; the same justice drawing the opinion as in both the indictment cases above referred to:

"We do not say that the death must be instantaneous. We have never so held. Very few injuries cause instantaneous death. 'Instantaneous' means done or occurring in an instant, or without any perceptible duration of time; as the passage of electricity appears to be instantaneous. * * * And, when we say that the death must be immediate, we do not mean to say that it must follow the injury within a time too brief to be perceptible. If an injury severs some of the principal blood vessels and causes the person injured to bleed to death, we think his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes and then dies, we think his death may very properly be considered as immediate, though not instantaneous. Such a discrimination may be regarded by some as excessively exact or nice, and therefore hypercritical. But in stating legal propositions it is impossible to be too exact; and, while courts and some writers of text-books have used indiscriminately the words 'instantaneous' and 'immediate,' and the adverbs 'instantaneously' and 'immediately,' we have not

regarded them in this class of cases as meaning precisely the same thing, and have preferred to use the words 'immediate' and 'immediately' as being more comprehensive and elastic in their meaning than the words 'instantaneous' and 'instantaneously,' and better calculated to convey the idea which we wish to express. Of course, an instantaneous death is an immediate death; but we have not supposed that an immediate death is necessarily and in all cases an instantaneous death."

The word "immediate" is, as the court say, an "elastic term," depending upon the facts of each case. This construction recognizes a statutory right of action in case of a blow producing unconsciousness that continues until death. The doctrine admitted, it matters not how long a period of unconsciousness may intervene.

In *Conley v. Portland Gaslight Co.*, 96 Me. 281, 12 Am. Neg. Rep. 461, 52 Atl. 656, which also came to this court on demurrer to the declaration, the court emphasizes the same view in the following language:

"As construed by our court in *Sawyer v. Perry*, [88 Me. 42, 15 Am. Neg. Cas. 291] it is obvious that the statute of 1891 in question affords a right of action for injuries causing the death substantially like that given to employees by the Employers' Liability Act in Massachusetts. The second section of that Act (chapter 270, Pub. St. 1887) gives a right of action 'where an employee is instantly killed, or dies without conscious suffering;' and it was held in *Martin v. Boston & M. R. R.* 175 Mass. 502, 56 N. E. 719, that an action could not be maintained under this statute in a case where the injured person survived and endured conscious suffering less than one minute after the injury. See also, *Hodnett v. Boston & A. R. R.*, 156 Mass. 86, 15 Am. Neg. Cas. 451, 30 N. E. 224; *Green v. Smith*, 169 Mass. 485, 48 N. E. 621; *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269; *Willey v. Boston Elect. L. Co.*, 168 Mass. 40, 1 Am. Neg. Rep. 625, 46 N. E. 395. Whether, in the case at bar, it might not reasonably be considered an immediate death within the meaning and purpose of our statute, if the decedent immediately became unconscious after his injury and remained in a conscious state for twenty minutes or even for several hours or days, until life became extinct, it is unnecessary here to determine."

In the case under consideration this question is squarely raised, and it is the opinion of the court that the suggestion in *Conley v. Portland Gaslight Company* is sound, and that the statute of 1891 was designed to cover cases of immediate death, which includes cases both of instantaneous death and of total unconsciousness fol-

lowing immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial. The defendant's contention upon this point fails.

2. CONTRIBUTORY NEGLIGENCE. — The cause of the accident was the intestate's act in attempting to pass beneath the swiftly moving belt at such a point that he was hit by the Jackson hooks. The danger was an obvious one, at least the belt itself was obvious, and the danger of contact with it, whatever the fastening, was apparent to any man using his senses. It was not necessary that he should appreciate the danger in all its details. *Connelly v. Hamilton Woolen Co.* 163 Mass. 156, 15 Am. Neg. Cas. 567, 39 N. E. 787. But the evidence is convincing that the intestate did not know and appreciate the particular danger of which complaint is now made. These hooks had been placed upon the belt about six months before the accident, and had been in continuous use since. Admitting that they could not be seen when the belt was in motion, yet the engine was shut down every Sunday morning for the day in order that the engine, shafting, and belting might be inspected and the plaintiff as engineer was present during that time. He had full opportunity to know and must have known what these fastenings were. This is confirmed by the testimony of two witnesses, one of whom testified that Mr. Perkins helped him mend the belt on engine No. 3, which was similar to No. 4 and under Perkins' charge, and the other testified that Perkins once told him he "would hate to get hit by them." The conclusion that Perkins knew the exact condition is irresistible. Assuming that duty called the intestate to the open space beyond the belt, he had two routes open before him by which to reach it, one admittedly safe, the other attended with danger; one enabling him to pass beneath the belt between the second pillar and the rear wall where there was a passageway of three and a half feet between the second pillar and the pump and a clear space between the top of his head and the belt of from one to three feet, and the other between the two pillars where the belt was about six inches below the top of his head, and he must stoop low if he could pass beneath it at all. He chose the latter, the obviously unsafe route, and he alone must bear the consequences.

In *American Linseed Co. v. Heins*, 141 Fed. 49, 72 C. C. A. 533, the employee made a similar choice, and on this point the court say: "There was no necessity justifying his conduct in passing over the revolving drum. He could have reached the place which he desired to go by means of a platform which at least in comparison with the way he did adopt was entirely safe. His failure to choose the safe way was under the decisions of this court negligence."

In *Morris v. Railway Co.*, 108 Fed. 747, 47 C. C. A. 661, the court declare the rule as follows: "When there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of injury which its use entails." To the same effect are *Russell v. Tillotson*, 141 Mass. 201, 15 Am. Neg. Cas. 626, 4 N. E. 231; *Galvin v. Old Colony R. Co.*, 162 Mass. 533, 15 Am. Neg. Cas. 481, 39 N. E. 186; *Leard v. Internat. Paper Co.*, 100 Me. 59, 18 Am. Neg. Rep. 105, 60 Atl. 700.

This was not the case of an emergency call and a quick hurrying order from a foreman which the servant instinctively obeyed, as in *Millard v. Railway Co.*, 173 Mass. 512, 53 N. E. 900, and *Jensen v. Kyer*, 101 Me. 106, 63 Atl. 389. Here the servant acted voluntarily and deliberately and made the short cut which he must have known was dangerous had he stopped to think, or else he attempted it thoughtlessly. Either view would prevent recovery.

It is fair to assume that he did think of the danger and relied upon his own judgment to avoid it because the only witness who saw the accident states that he saw him stooping as he approached the belt. But to attempt to pass voluntarily and unnecessarily beneath a rapidly moving belt at such a point that he was liable to be struck by it and owing to his own error in judgment was in fact struck by it was clearly negligence on his part.

Analogous cases of a set screw upon a revolving shaft emphasize this accepted doctrine. *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 15 Am. Neg. Cas. 630, 36 N. E. 789; *Ford v. Mount Tom Sulphite Co.*, 172 Mass. 544, 7 Am. Neg. Rep. 104, 52 N. E. 1065; *Demers v. Marshall*, 172 Mass. 548, 52 N. E. 1066; *Id.*, 178 Mass. 9, 59 N. E. 545.

In *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 16 Am. Neg. Rep. 89, 70 N. E. 437, where an experienced machinist attempted to step over a revolving shaft, the plaintiff's right of recovery was denied in these words: "The plaintiff was a man of experience; and, while he testified that he did not know of the existence of the old collar on the shaft, he had ample opportunity to ascertain its existence. The defendant was not bound to change his machinery or to point out to the plaintiff the fact of the existence of the set screw on the collar. The danger from the revolving shaft was apparent, and as such shafts have collars fastened to them by set screws, a fact well known to the plaintiff, his getting so near the shaft as to be caught was an act of negligence. Moreover, he could have gone by a safer way, and, unless he chose to take the risk of

stepping over a revolving shaft, he could have stopped the engine over the running of which he had full control."

The fact that others took the same route in doing the same work is immaterial. *Gillette v. General Electric Co.*, 187 Mass. 1, 17 Am. Neg. Rep. 281, 72 N. E. 255. That fact rendered the way no less dangerous nor their conduct less negligent. It is common knowledge that experience sometimes renders men careless in the performance of duties, and leads them to take chances that the ordinarily prudent man under the same circumstances would not take.

It is needless to multiply authorities. After a careful consideration of the whole evidence, we feel satisfied that the unfortunate accident to the plaintiff's intestate is attributable to the want of due care on his own part.

This view of the case renders it unnecessary to consider the question of negligence on the part of the defendant or the exceptions.

Motion sustained. Verdict set aside.

YOUNG v. RANDALL.

Supreme Judicial Court, Maine, April, 1908.

1. MASTER AND SERVANT—ASSUMPTION OF RISK.—When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care, and experience ought to know and appreciate. He also assumes the risks of all dangers of which he knows and which he should appreciate, whether obvious and visibly apparent or not.
2. SERVANT INJURED BY CIRCULAR SAW—EVIDENCE INSUFFICIENT TO MAINTAIN ACTION.—The plaintiff while operating a swinging circular saw in the defendant's employ sustained personal injuries resulting in the loss of the second and third fingers of the left hand and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant. The plaintiff thereupon brought an action against the defendant and recovered a verdict for \$1,000. Assuming all the facts to be as claimed by the plaintiff, *held*, that the action cannot be maintained, and the verdict is so clearly wrong that the same must be set aside (1).
(Official.)

1. For "Master and Servant" cases from 1897 to 1907, see Vols. 1-20 AM. NEG. REP., and the cases in this volume.

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) where the cases are collated under the respective titles of MASTER AND SERVANT, MA-

ON MOTION from Supreme Judicial Court, Kennebec County.

ACTION by Frank O. Young against Ira H. Randall. Verdict for plaintiff for \$1,000. *Motion to have verdict set aside granted.*

"Action on the case to recover damages for personal injuries sustained by the plaintiff while operating a swinging circular saw in the defendant's employ, resulting in the loss of the second and third fingers of the left hand and the mutilation of the fourth finger so as to render it useless, and caused by the alleged negligence of the defendant, in that the 'saw table was not provided with any standards or upright pieces sufficiently near the path of the saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in and upon said saw, and thereby said plaintiff's employment was made unnecessarily dangerous.'"

ARGUED before EMERY, C. J., and SAVAGE, STROUT, SPEAR, and CORNISH, JJ.

WILLIAMSON & BURLEIGH, for plaintiff.

A. M. GODDARD, for defendant.

CORNISH, J. — Tort for personal injuries while operating a swinging circular saw in defendant's employ. The defendant is a manufacturer of lumber and manager of the Augusta Lumber Company, which operates a large mill at Augusta. In the spring of 1905, he purchased a lot of standing timber in the neighboring town of Belgrade, and sent a crew there to cut and manufacture the same. Among them was the plaintiff, who was the owner of a team of four horses and of a portable sawing machine driven by a gasoline engine. After working with his team five or six weeks yarding logs, the plaintiff started his sawing machine, and with the assistance of Mr. Weston, the foreman, attempted to saw a small lot of ash logs into shovel handle bolts about forty-four inches long. This proved impracticable, as the logs, varying in length from twenty-five to thirty feet, were too heavy to be handled and sawn easily with his machine, which was constructed in the ordinary way for sawing cord wood, with a stationary circular saw and a push or sliding table.

The foreman then suggested the necessity of a swinging saw with a stationary table, and sent word to Mr. Randall through the plaintiff where a second-hand machine of that sort could be obtained. Mr.

CHINERY, DEFECTIVE APPLIANCES, ASSUMPTION OF RISK, AND RISK OF EMPLOYMENT, ETC.

See also 15 AM. NEG. CAS., where the *Maine* cases, from the earliest period to 1897, are reported. The

cases in the several States arising out of the relations of MASTER AND SERVANT, covering the earliest period to 1897, are reported in Vols. 13, 14, 15 and 16 AM. NEG. CAS.

Randall thereupon procured the saw, and sent it, with necessary shafting and pulleys purchased elsewhere, to Belgrade, and with it went Mr. Dixon, his millwright, who was to have charge of setting it up.

The temporary machine was then hastily constructed. A table or platform about eighteen inches wide and two feet high was built of planks resting on blocking. The left end of this table, viewed from the operator who stood in front of it, was connected with a run provided with rolls over which the logs were pushed by hand lengthwise from the ground upon and along the table. Against the side of the table opposite the operator stood three heavy logs or posts set firmly in the ground, and extending above the table six or eight feet, carrying on their tops the bearings or boxes which held the main shaft. One of these posts stood within a few inches of the right end of the table, another towards the left end and eight feet from the first and between the two a third the exact location of which is in controversy. At the right of this middle post and one foot from it, according to the plaintiff, or two and a half inches from it, according to the defendant, the saw frame or ladder was suspended from the main shaft in such a manner that the circular saw attached to the lower end could be swung forward and backward in the slot extending part way across the table by means of an oxbow bolted to the ladder, and extending forward toward the operator. The distance from the saw to the right end of the table was the exact length of a bolt, 44 inches. Four men were employed in working the machine, two at the left with cant dogs to push the logs upon the table and hold them in place, one to operate the saw, and one at the right to keep the end of the log flush with the end of the table, and to remove the bolt. In operation the logs were pushed upon the table, the larger end ahead, the scarf was first sawn off, then the various bolts, and, if the smaller end was less than six inches in diameter that portion was used for cordwood.

As the saw was hung somewhat higher than the table, it had a natural tendency in cutting to draw the logs toward and under it, a tendency which was stronger in the smaller logs, and which could be resisted only by having proper guards and supports on the back of the table. The failure of duty alleged by the plaintiff in his writ is that "the saw table was not provided with any standards or upright pieces sufficiently near the path of said saw, so that a log or bolt could rest against the same and be held steadily in place and prevented from swinging in upon said saw." The plaintiff admits the existence of the three posts before described, but says they were in-

sufficient for the purpose, as there was a space of forty-four inches at the right of the saw, and on one foot at the left without any support or guard whatever, so that, in sawing a stick of such a length that it reached from the right end of the table to a point between the saw and the post on the left it had no support whatever except at the extreme right end, and the action of the saw tended to pull it in toward itself, taking with it the hand of the operator resting upon the stick. The defendant met this issue by offering evidence tending to show that the distance from the saw to the post on the left was only two or three inches, that four or five inches at the right of the saw was an additional post firmly set in the ground and extending above the table there to serve this very purpose, and also that guides or guards were attached to the back of the table, the one at the left of the saw extending from post to post, being a timber four inches square, and the one at the right from post to post a plank two by six set on edge.

Here was a sharp issue of fact, the plaintiff admitting that, if the fourth post and the guards were there at the time of the accident, the table was reasonably safe, and the defendant admitting that, if they were not there, it was negligently constructed.

The jury found for the plaintiff upon this as upon all other issues, and their verdict the defendant asks to be set aside. It is unnecessary to consider the question of the defendant's care or want of care in the construction of the machine. The plaintiff is in this dilemma. If the defendant was not guilty of negligence in this respect, the plaintiff admittedly cannot recover. If the defendant was guilty of negligence, the plaintiff is precluded from recovering because of his own knowledge of the careless construction and his assumption of the attendant risks. This is a fatal point in the plaintiff's case.

The particular danger on which he bases his right to recover was the lack of protection against the tendency of the saw to draw the logs to itself. But this was no concealed or hidden danger. It was obvious as soon as he began to operate. He felt the tendency to draw. He admits it. He saw the lack of protection; and with his experience he must or at least should have known the risk attendant upon the sawing of a stick resting against only one support. The plaintiff was not an inexperienced boy but a man thirty years of age, of intelligence, and of some experience with circular saws. He was the owner of a portable sawmill, and had himself operated it six weeks or more during the previous winter, and in that time must have learned its traits. While that worked on a somewhat different plan from this, yet the difference and its effects must have been

obvious to him. He had asked for no instructions before beginning work nor during its progress. Though Mr. Weston, the foreman, stood near by, he apparently needed none. The foreman could have told him nothing that he himself could not see and appreciate. In his writ he does not complain because no instructions were given him. He began and continued the work without protest or objection confident of his own knowledge and experience. There is evidence that he even showed impatience when cautioned more than once by the foreman not to jump the saw and not to keep his left hand upon the log. His method of operation was to pull the swinging saw by the oxbow with his right hand, while he steadied himself by placing his left hand upon the log at the right and within five or six inches of the saw itself. He worked but little the Wednesday afternoon that the machine was completed, as the saw needed setting and filing, but began on Thursday morning and worked during the forenoon. He says that he noticed the tendency of the saw to pull the logs toward it as it cut, especially the smaller and more crooked ones, and during the forenoon "there was one log that the cant of it was kind of up and kind of crooked, and it turned down as a stick naturally would. The saw pinched in the wood a mite, and the log rolled toward the saw, and went out through." The accident of the afternoon was practically a repetition of this. In the afternoon the plaintiff had worked but half an hour before he was injured. His own description of the accident is clear. "Well, we had a log come up and I sawed off this scarf, and it came on and I sawed it again. I would say three or four cuts into three or four of these sticks that we used for bolts, and then there came a piece here that was just a little longer than it ought to be, about six inches longer, and I thought it was smaller than six inches, so I threw it off, but Weston wanted it sawed — so I took it up and held it on the saw like that (illustrating) and the saw bit on to it and took my hand in. * * * I took hold of this saw and brought it to me, and, as I did, it kind of rolled this way a little, and when I put the saw on, she bit here, and then caught and went right over like that (illustrating). I think both pieces went out under the saw that way. I know they got out of my way." On the plaintiff's own statement nothing unusual happened, nothing that the plaintiff might not himself have anticipated if the conditions were favorable. He nowhere stated that he did not see and appreciate the precise risk in question. He simply denies having worked on this particular kind of a machine prior to the day of the accident. The doctrine of assumption of risk has been so often and so fully expounded that its mere statement is sufficient.

"When one enters into the service of another, by virtue of the employment he assumes the risk of all obvious and apparent dangers which are incident to the business, and of all which, by the exercise of reasonable care, one of his age, care, and experience ought to know and appreciate. He also assumes the risks of all dangers of which he knows, and which he should appreciate whether obvious and visibly apparent or not." *Babb v. Oxford Paper Co.*, 99 Me. 298, 17 Am. Neg. Rep. 114, 59 Atl. 290. See also, *Mundle v. Hill Mfg. Co.*, 86 Me. 400, 15 Am. Neg. Cas. 281, 30 Atl. 16.

The application of this firmly established principle to the case at bar precludes recovery. The accident arouses our sympathy, but, assuming all the facts to be as the plaintiff claims, this action cannot be maintained. *Demers v. Deering*, 93 Me. 272, 44 Atl. 922; *Wilson v. Steel Edge Stamping & Refining Co.*, 163 Mass. 315, 39 N. E. 1039, 15 Am. Neg. Cas. 548, *Tenanty v. Boston Mfg. Co.*, 170 Mass. 323, 49 N. E. 654; *St. Jean v. J. H. Tolles & Co.*, 72 N. H. 587, 58 Atl. 506, 17 Am. Neg. Rep. 97.

The jury did not give proper consideration to the plaintiff's assumption of the risk. Whether they were unduly affected by sympathy or by the unmaintainable position so persistently contended for by the defendant's counsel as to the ownership of the machine or by both it is impossible to determine.

But, whatever the cause, the verdict is so clearly wrong that the entry must be:

Motion sustained. Verdict set aside.

BOWEN v. WORUMBO MANUFACTURING CO.

Supreme Judicial Court, Maine, December, 1908.

1. NEW TRIAL—SUFFICIENCY OF EVIDENCE.—When the evidence in behalf of a plaintiff upon the question of the defendant's liability is entirely uncontradicted, it must receive its full probative force.
2. MASTER AND SERVANT—ASSUMPTION OF RISK—GENERAL KNOWLEDGE OF DANGER.—It is well-settled law that a general knowledge of a danger, without an appreciation of it, is not conclusive upon the question of the assumption of the risk.
3. INJURIES TO SERVANT CAUSED BY FALLING ON ICY STEPS—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—ASSUMPTION OF RISK.—The plaintiff was an operative in the defendant's

woolen mill, where she had been an operative about sixteen months. At the rear entrance to the mill was an outside stairway of twenty-one steps descending to the ground, with a railing on each side about three feet above the stair, but without any balusters between the treads and the rail. This stairway was uncovered and entirely exposed to the elements, and was so located and constructed that the drippings from the roof fell directly upon the upper steps. On Monday, December 10, 1906, there was a coating of ice upon the upper steps caused by melting snow and ice on the roof dripping upon the stairway; but this ice was concealed by a few inches of light snow that had fallen Sunday night and Monday forenoon. The plaintiff came out of the mill at noon and saw the snow on the steps, but she testified that she saw no ice there, and there was no evidence that she knew that the ice was on the steps at that hour. She started to come down with her right hand on the rail and found a safe footing in the snow on the first step, but slipped on the second one and fell under the railing and off of the end of the steps to the ground and was injured. Not only was the snow frequently shoveled off of these stairs in the winter, but also the ice forming upon them from time to time was frequently chopped and scraped off by the servant of the defendant employed for that purpose in connection with other duties; but this was not done on the forenoon of the accident. This open stairway had been habitually used with the knowledge of the defendant for a period of eighteen years as a means of entering and leaving the mill by all operatives who might find it a more direct and convenient way than that from the front entrance, in going to and from their homes (1).

Held:

1. That the jury was warranted in finding that there was a failure of duty on the part of the defendant towards the plaintiff in neglecting to keep this stairway in a reasonably safe and suitable condition for the accommodation of its operatives, who thus had an implied invitation to use it in entering and leaving the mill.
2. That the jury was also warranted in finding that the plaintiff was not guilty of contributory negligence.
3. That, under the facts and circumstances of the case, it cannot be said as a matter of law that the plaintiff understood and appreciated the dangerous condition of the steps, and hence voluntarily assumed the risk of using them, and that this question was properly submitted to the jury as a question, and that the finding of the jury in favor of the plaintiff on that question does not appear to be unreasonable.
4. That the damages awarded by the jury do not appear to be excessive.

(Official.)

1. For similar cases to that of the case at bar, decided in the several States from 1897 to 1907, see Vols.

1-20 AM. NEG. REP., and this volume of that series of Reports.

ON MOTION from Supreme Judicial Court, Androscoggin County.

ACTION on the case for personal injuries by Lulu C. Bowen against the Worumbo Manufacturing Company. Verdict for plaintiff for \$1,475, and defendant moves for a new trial. The facts appear in the opinion. *Motion overruled. Judgment on the verdict.*

ARGUED before EMERY, C. J., and WHITEHOUSE, SPEAR, CORNISH, KING, and BIRD, JJ.

MCGILLICUDDY & MOREY, for plaintiff.

NEWELL & SKELTON, for defendant.

WHITEHOUSE, J. — The plaintiff was an operative in the defendant's woolen mill and recovered a verdict of \$1,475 for injuries received by slipping on the second step from the top of an outside stairway leading to the mill, and falling to the ground, a distance of thirteen feet. At the trial the defendant introduced no testimony except that of a medical expert, who testified in regard to the plaintiff's present physical condition. The evidence on behalf of the plaintiff upon the question of the defendant's liability was therefore entirely uncontradicted, and must receive its full probative force. The case comes up on motion to set aside the verdict.

At the rear entrance to the mill was an outside open stairway of twenty-one steps descending to the ground, with a railing on each side about three feet above the stairs, but without any baluster between the treads and the rail. This stairway was uncovered and entirely exposed to the elements, and was so located and constructed that the drippings from the roof above fell directly upon the upper steps.

The accident happened on Monday noon, December 10, 1906. The plaintiff had then been employed in the mill about sixteen months. Some time between Saturday and Monday, and possibly at an earlier date, the melting snow and ice on the roof had dripped upon the stairway and formed a coating of ice upon the steps varying in thickness from half an inch to two inches, but this ice was concealed on Monday noon by a few inches of light snow that had fallen Sunday night and that forenoon. The plaintiff came out of the mill at noontime and saw the snow on the steps, but states that she saw no ice there, and there is no evidence in the case that she knew that there was ice on the steps at that hour. Three persons, one woman and two men, immediately preceded her and passed down without accident. She started to come down with her right hand on the rail and found a safe footing in the snow on the first step, but slipped on the second one and fell under the railing and off of the end of the

steps to the ground. Twelve or fifteen other operatives came down this stairway at the same noon hour.

There was undisputed evidence that not only was the snow frequently shoveled off of these stairs in the winter, but that the ice forming upon them from time to time was frequently chopped and scraped off by the servants of the defendant employed for that purpose in connection with other duties; but this was not done on the forenoon of the accident.

There was also undisputed testimony that this open stairway had been habitually used, with the knowledge of the defendant, for a period of eighteen years, as a means of entering and leaving the mill by all operatives who might find it a more direct and convenient way than that from the front entrance, in going to and from their homes.

It is the opinion of the court that these facts afforded sufficient evidence to warrant the jury in finding that there was a failure of duty on the part of the defendant towards the plaintiff in neglecting to keep this stairway in a reasonably safe and suitable condition for the accommodation of its operatives, who thus had an implied invitation to use it in entering and leaving the mill, and also in finding that the plaintiff was not guilty of contributory negligence on her part at the time of the accident.

It is insisted, however, by the defendant that the plaintiff must have known of the danger, and that in attempting to descend the stairs in that condition she voluntarily assumed the risk of so doing. But it is settled law that a general knowledge of a danger, without an appreciation of it, is not conclusive upon the question of the assumption of the risk. *Frye v. Bath Gas & Elec. Co.*, 94 Me. 17, 8 Am. Neg. Rep. 44, 46 Atl. 804. And in the case at bar it has been noted that the duty of the defendant, prior to the accident, had frequently been performed by cutting and removing the ice from the stairway, and that thus its condition necessarily changed from time to time. When therefore this fact is considered with the testimony of the plaintiff that she did not see any ice there before she fell, and the absence of any direct evidence that she knew that there was ice concealed under the snow on the steps at that time, it cannot be said as a matter of law that she understood and appreciated the dangerous condition of the stairs, and hence voluntarily assumed the risk of attempting to use them. To this effect was the decision of the court in *Fitzgerald v. Conn. River Paper Co.*, 155 Mass. 155, on page 162, 29 N. E. 464, on page 467, 15 Am. Neg. Cas. 686, on page 694, a case in which the facts were analogous to those at bar, but more favorable

to the defendant (2). In the opinion the court say: "We are of opinion that it cannot be said, as matter of law, that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that this condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from the steam pipe and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. * * * See, also, *Osborne v. London & N. W. Ry. Co.*, 21 Q. B. D. 220, a case precisely in point."

It is, accordingly, the opinion of the court that the question whether the plaintiff understood and appreciated the danger was properly submitted to the jury as a question of fact, and that their finding in her favor upon that question does not appear to be unreasonable.

Nor does it satisfactorily appear from the evidence that the damages awarded by the jury were excessive.

Motion overruled.

Judgment on the verdict.

2. In *Fitzgerald v. Conn. River Paper Co.*, (Mass., 1891) 155 Mass. 155, 15 Am. Neg. Cas. 686, the Supreme Court (per KNOWLTON, J.) said, on page 695 of 15 Am. Neg. Cas. 695: "*Osborne v. L. & N. W. Ry. Co.*, 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in *Yarmouth v. France*, 19 Q. B. Div. 647, and *Thomas v. Quartermaine*, 18 Q. B. Div. 685: 'Those observations go far to make it hard for a defendant to succeed on such a defense

as that relied on here, for it is probable that juries would often find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk, but that cannot be helped. These judgments introduce an important qualification of the maxim '*volenti non fit injuria*.' In the present case [the *Fitzgerald* case] the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow.'"

PODVIN v. PEPPERELL MANUFACTURING CO.

Supreme Judicial Court, Maine, December, 1908.

1. MASTER AND SERVANT—LIABILITY OF MASTER—SAFE APPLIANCES.—If the employer furnishes the operative a machine, strong, in good repair, and without dangerous features not visible to an observing operator, or made known to him, and such as the employer should have known, he, the employer, discharges his full legal duty to the operative in that respect. He can otherwise use machines of such pattern, detail of construction, and roughness of finish as he prefers, leaving to the operative free choice to operate the machine or not as he prefers.
2. SET SCREWS—DANGEROUS APPLIANCES.—The employer of an operative upon a machine is not legally obliged to have the set screws upon the machine so countersunk or otherwise fixed as to remove all danger from them, provided they are plainly visible to an observing operative.
3. ASSUMPTION OF RISK.—An operative undertaking to operate a particular machine, without stipulation to the contrary, assumes the risk of injury, not only from those features of the machine called to his attention, but also those open to observation. It is the duty of the operative to acquaint himself with at least all the visible features of the machine before undertaking its operation.
4. SAME.—An operative's ignorance of set screws in the machine does not relieve him of the risk of danger from them where they are plainly visible and easily seen.
5. SAME.—In this case the set screws, projecting five-eighths of an inch above the surface of the collar on the small shaft, were plainly visible to an observing operative, being near and in front of a window. The female operative of mature years had operated the machine in that condition for nineteen years, during which time she cleaned the machine about the set screws and the floor under them at least twice a week. *Held*, that she was chargeable with knowledge of the set screws, and, not having stipulated to the contrary, had assumed the risk of danger from them.
6. LIABILITY OF SERVANT—ASSUMPTION OF RISK.—Although the female operative had the duty to pick up articles as they fell to the floor under the shaft bearing the set screws, she nevertheless, under the circumstances above stated, assumed the risk of her hair becoming entangled in the set screws, and cannot recover for any injury resulting therefrom. Being chargeable with knowledge of the screws, she is also chargeable with knowledge of the obvious danger of injury if she allowed her hair to become entangled in them (1).

(Official.)

1. For "Master and Servant" lar accidents as reported in the case cases, and cases arising out of simi- at bar, see Vols. 13, 14, 15 and 16

ON MOTION from Supreme Judicial Court, York County.

ACTION by Angele Podvin against the Pepperell Manufacturing Company. Action on the case to recover damages for personal injuries sustained by the plaintiff while operating a spinning machine in the defendant's mill, and which said machine the plaintiff alleged to be "unsafe, unsuitable, inconvenient, out of repair, and dangerous, in that there projected from a shaft upon or connected with said machine a set screw, nut or bolt, the same projecting a certain distance, to wit, one inch," and that the set screw caught in her hair, and "stripped her scalp from neck to eyebrow." Plea, the general issue, with brief statement as follows: "That any and all the risks, dangers, and conditions of which the plaintiff complains in her writ and declaration were assumed by the plaintiff prior to the injuries alleged to have been received by the plaintiff."

Plaintiff recovered a verdict for \$2,500, and defendant filed a general motion to have the verdict set aside. *Motion sustained.*

ARGUED before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEA-BODY, and SPEAR, JJ.

CLEAVES, WATERHOUSE & EMERY, for plaintiff.

NATHANIEL B. WALKER and GEORGE F. & LEROY HALEY, for defendant.

EMERY, C. J. — This case is one of that class now come to be known as "set screw cases." The evidence for the plaintiff, and the uncontradicted and credible evidence for the defendant, establishes the following as the version to be taken as true: The plaintiff was a woman fifty-nine years of age in the employ of the defendant company in its cotton mill, and had charge of and operated a somewhat complex spinning machine known as an "intermediate" Two revolving metal cones, one above the other, ran lengthwise this machine under the spindles. The lower cone was within two inches of the floor. The upper cone was twenty-four and a half inches above and directly over the lower cone. The small end of the upper cone was connected with the end of a shaft by a metal collar held and tightened in place by set screws projecting five-eighths of an inch above the surface of the collar. The diameter of the collar and cone at

AM. NEG. CAS., where the decisions in the several States from the earliest period to 1897 are chronologically arranged and grouped. See particularly Vol. 15 AM. NEG. CAS., where the Maine and Massachusetts "Set Screw" cases are col-

lated. Subsequent actions from 1907 to date are reported in Vols. 1-21 AM. NEG. REP.

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) under the titles MASTER AND SERVANT, MACHINERY, SET SCREWS, etc.

this end was two and a half inches. When in operation, this cone revolved at a speed of 280 revolutions a minute. When at rest, the collar and set screws were plainly visible, being opposite a large window with plenty of light, and with nothing to conceal them from any one looking the machine over. The whole machine, including the cones and set screws, was of standard pattern and in common use in cotton mills.

The plaintiff had operated a similar machine for eight or ten years, and this particular machine for fifteen years, during which time no change had been made in the cone or set screws. In addition to tending the machine in its operation, she, as was her duty, cleaned it as often as twice a week and oftener of the dirt and cotton waste that accumulated on its various parts, including the cones and set screws. In addition to tending the machine in its operation, she, as was her duty, cleaned it as often as twice a week and oftener of the dirt and cotton waste that accumulated on its various parts, including the cones and set screws. She cleaned all around the gears and wheels, and also the ends of the cones and the set screws, getting out with a short-handled brush the cotton accumulating there. She also washed the floor under the cones and machine at least twice a week.

By the vibration of the machine while in operation, empty bobbins would at times be shaken from their shelf, or creel, and fall upon the floor under the machine. It was the duty of the plaintiff to pick these fallen bobbins from the floor as they fell, and restore them to their places. Frequently, to do this, she would need to reach her hand and arm in between the two cones to reach the fallen bobbins where they lay on the floor. She usually did so while the cones were revolving, and this practice was well known to the defendant's superintendent and overseers in that room. Her attention was never called by them or any one to the set screws, or to any danger from set screws.

At last, after fifteen years of such work by the plaintiff on and about this machine, as she was one day reaching down between the two revolving cones to pick up a fallen bobbin from the floor, her woman's hair became entangled in the set screws on the upper cone, and her scalp torn from her head. There was, of course, a danger that, while so picking up fallen bobbins from the floor, the plaintiff might be hurt by the revolving set screws. Was that danger a risk cast upon the defendant, or a risk assumed by the plaintiff?

The plaintiff claims that the risk was upon the defendant, because it did not have the set screws so countersunk or otherwise fixed as

to remove all danger of injury from them. This claim is not well founded. It is not the legal duty of an employer of labor upon machines to provide and use the safest possible, or even safest known, machines. There must be no weakness, no want of repair, no dangerous features not visible to an observing operative or made known to him, and such as the employer should have known. If such a machine be provided, the employer has done his full legal duty in that respect. He can otherwise use machines of such pattern, detail of construction, and roughness of finish as he prefers, leaving to the operative free choice to operate it or not as he prefers. *Wormell v. Maine Central R. R. Co.*, 79 Me. 397, 15 Am. Neg. Cas. 339, 10 Atl. 49; *Bryant v. Paper Co.*, 100 Me. 171, 60 Atl. 797; *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 15 Am. Neg. Cas. 630, 36 N. E. 789; *Keats v. National Heeling Machine Co.*, 65 Fed. 940, 13 C. C. A. 221; *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785, 16 Am. Neg. Cas. 29.

But the plaintiff further claims that the risk was upon the defendant, and had not been assumed by her, because her attention had not been called to the set screws, and to the danger of injury from them. This claim also is without foundation. An operative by agreeing to operate and operating a particular machine, without stipulation to the contrary, assumes the risk of injury, not only from those features of the machine called to his attention, but also from those open to observation. The law is well stated by the Massachusetts court in *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 15 Am. Neg. Cas. 630, 36 N. E. 789, a case where an operative was injured by a projecting set screw of which he did not know and had never heard. The court said: "When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say: 'I do not care to examine it. I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage. A projecting set screw is a common device for holding the collar on a shaft, although there is a safer kind of set screw in common use. Under

its contract with the plaintiff, the defendant owed him no duty to box the pulley or shaft, or to change the set screw for a safer one."

In the case at bar the set screws were open and exposed to observation, and plainly visible to any one making the most cursory examination of the machine and its operation. They were not in any obscurity, being well lighted from a window but a few feet away. They were directly visible to an operative washing the floor under them, or cleaning cotton waste from them. It is urged, however, that they were not visible while the collar was revolving 280 times a minute. There is no evidence to that effect, and we do not find it self-evident that a collar only two and one-half inches in diameter bearing set screws projecting five-eighths of an inch, and revolving at that speed, would show a smooth surface. But, however that may be, there is no evidence that the collar was always revolving at that or any speed. It undoubtedly was often at rest when the set screws could be plainly seen. There is no suggestion of immaturity, or want of experience, or want of intelligence on the part of the plaintiff. It was her duty to acquaint herself with the machine she was to operate, and, in the absence of stipulation to the contrary, she assumed, not only the risks pointed out to her, but those open and visible. If she did not observe them, she none the less assumed the risk of them. *Ragon v. Toledo, etc., Ring Co.*, 97 Mich. 265, 56 N. W. 612, 16 Am. Neg. Cas. 157, and cases *infra*.

It has been held in several decided cases that ignorance of set screws in machinery does not relieve the operative of the risk of danger from them where they are open to observation. *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 15 Am. Neg. Cas. 630, 36 N. E. 789; *Ford v. Mt. Tom. Sulphite Co.*, 172 Mass. 544, 7 Am. Neg. Rep. 104, 52 N. E. 1065; *Archibald v. Cygolf Shoe Co.*, 186 Mass. 213, 16 Am. Neg. Rep. 401, 71 N. E. 315; *Kennedy v. Merri-mack Paving Co.*, 185 Mass. 442, 16 Am. Neg. Rep. 89, 70 N. E. 437; *Mutter v. Lawrence Mfg. Co.*, 195 Mass. 517, 81 N. E. 263.

The danger to a woman from allowing her hair to become entangled in set screws revolving as these were is too obvious for comment.

Under the law and the facts of the case, the plaintiff must be held to have assumed the risk of the injury she received.

Verdict set aside.

FARRELL v. MANHATTAN MARKET COMPANY. (THREE CASES.)

Supreme Judicial Court, Massachusetts, April, 1908.

SALE OF UNWHOLESOME FOOD—SELECTION BY PURCHASER—DEALER NOT LIABLE.—In an action of tort against the defendant, proprietor of a provision market, the declaration alleged that defendant “negligently sold to plaintiff at its market, as food, and with the implied warranty that it was fit for food, a certain slaughtered fowl, which fowl was not safe for eating, but was poisonous,” that the fowl was cooked and part of it eaten by plaintiff who was made sick thereby, and “that the defendant knew, or in the exercise of reasonable care and diligence could and should have known that the said fowl was unfit for food.” From the evidence it appeared that plaintiff purchased the fowl at a bargain counter on a Saturday night, it being defendant’s custom on such nights to sell fowl at half price, the selection being made by the buyers, that plaintiff asked the salesman if it was a “cold storage fowl,” and he replied “it’s strictly fresh.” *Held*, that a verdict was properly directed for defendant, there being no evidence to submit the question whether plaintiff relied on the skill and judgment of the salesman in selecting the fowl, as defendant was not liable if it believed the fowl to be wholesome, and there was no evidence that it did not so believe (1).

NEGLIGENCE NOT THE TEST OF LIABILITY.—As due care is no defense when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection, because in offering these several articles, he impliedly represents that he believes all of them to be fit for food.

EXCEPTIONS from Superior Court, Middlesex County.

Three actions of tort for damages by Rena Farrell and her two children against the Manhattan Market Company. A verdict was directed for defendant in each action, and plaintiff brings exceptions. The facts are stated in the opinion. *Exceptions overruled.*

COAKLEY, COAKLEY & SHERMAN and M. A. SULLIVAN, for plaintiffs.

H. T. RICHARDSON, for defendant.

1. *As to liability for injury caused by sale of dangerous article or commodity*, see the AMERICAN NEGLIGENCE DIGEST (1909 edition) where the cases reported in Vols. 1-20 AM.

NEG. REP. (1897-1907) are collated under the titles, DANGEROUS ARTICLE, DANGEROUS COMMODITY. See also CAVEAT EMPTOR.

LORING, J.— This case comes up on an exception to a ruling directing a verdict for the defendant.

The plaintiff in the third case (whom we shall speak of as the plaintiff) was the mother of those in the other two. The defendant is a corporation engaged in carrying on a retail market and provision store. The jury were warranted in finding the following to be the facts in the case:

On a Saturday evening in July the plaintiff, in the words of the bill of exceptions, "purchased a chicken from one of the salesmen" of the defendant. She asked the salesman if it was a cold storage fowl, and he answered: "Don't you know a good thing when you see it? It's strictly fresh." She paid twelve and a half cents a pound, the price "having been reduced from twenty-five cents per pound, which was the defendant's custom on Saturday night in several of its departments."

The next morning at ten o'clock she removed the entrails, washed the fowl, wiped, boiled and then roasted it, and at four o'clock she and the other two plaintiffs ate a portion of it and were made sick; what they suffered from was ptomaine poisoning.

The plaintiff introduced expert evidence that if the chicken was not fit for food there would be a discoloration "from the neck down the length of the backbone; that if no such discoloration were visible the chicken was fit for food, unless it had eaten some poisonous substance, which might be shown by an examination of the crop, if the meat itself were diseased; all of which could be ascertained upon inspection by any one familiar with the examination of chickens." She testified "that she noticed no such discoloration at any time."

It appeared "that the defendant requested its customers not to handle fowl before purchasing, which was known to the plaintiff Mary, but that nothing was said to her in this particular at the time of the sale, and that this request was frequently ignored by customers, which fact was not known to her."

At the conclusion of the evidence the plaintiffs requested the court to rule "that a retail dealer in provisions selling chicken under the circumstances in this case impliedly warranted the chicken fit for food," also "that it was a question of fact for the jury to say whether or not the chicken was fit for food, whether or not the plaintiffs were injured by eating of diseased chicken, and whether or not the defendant was negligent in failure to make a sufficient and proper examination of the chicken before selling it to the plaintiff for consumption." The court declined to give the plaintiffs' requests, saying that it did not feel called upon to make such ruling,

and ruled that there was not sufficient evidence that would warrant the jury in finding a verdict for the plaintiffs, and ordered a verdict for the defendant in all three cases.

1. It was held in *Norton v. Doherty*, 3 Gray, 372, on the authority of *Williamson v. Allison*, 2 East, 446, that tort for a false warranty as well as an action of contract lies in case a chattel is sold with warranty and the warranty is broken. A number of earlier English cases to the same effect are collected by Holmes, J., in *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 587, 40 N. E. 1039, and the proposition is there repeated. To the same effect see *Emmons v. Alvord*, 177 Mass. 466, 470, 59 N. E. 126, and *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 237, 9 Am. Neg. Rep. 496, 59 N. E. 657. In tort for a false warranty, the *scienter* need not be alleged, and if alleged it need not be proved. Shaw, C. J., in *Norton v. Doherty*, 3 Gray, 372, 373; Holmes, C. J., in *Nash v. Minnesota Title Ins. Co.* and *Emmons v. Alvord*, *ubi supra*.

We assume therefore that an action of tort may be maintained for breach of a warranty. In the case at bar the plaintiff has alleged that the defendants sold the fowl to the plaintiff with the implied warranty that it was fit for food. The principal question in the case is whether that allegation has been made out.

In *Howard v. Emerson*, 110 Mass. 320, it was decided that in the sale of a cow by a farmer to a butcher to be cut up for meat there was no implied warranty that it was fit for that purpose. After stating the general rule to be that in a sale of goods the maxim *caveat emptor* applies and that the defendant contended that articles of food sold for immediate domestic use are an exception, MORTON, J., said: "But we think that this exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use."

Giroux v. Stedman, 145 Mass. 439, 14 N. E. 528, was a similar decision. There the defendants, who were farmers, killed two hogs and sold them to the plaintiffs to be eaten. The presiding judge instructed the jury as to the general rule laid down in *Howard v. Emerson*; next he told them that there was an exception in case of the sale of provisions by a dealer (although that had been left open in *Howard v. Emerson*), but he added that that exception did not apply to a sale by a farmer and left the case to the jury on the defendants' knowledge of the condition of the hogs. In disposing of an exception to this instruction DEVENS, J., said: "Whether this exception exists or not, it is not important in the case at bar to inquire, as it cannot be, and was not, contended that the defendants were brought within it."

It becomes necessary in the case at bar to consider the question left open in these two cases, and to decide whether there is such an exception to the general rule which obtains in the sale of chattels.

The first case of importance on this subject is *Bigge v. Parkinson*, 7 H. & N. 955, decided by the Exchequer Chamber in 1862.

Before that case was decided the law on the subject was not in a satisfactory condition.

It was laid down in a number of cases in the Year Books, collected in *Burnby v. Bollett*, 16 M. & W. 644, that the keeper of a tavern is liable for furnishing bad food or bad wine to his guests. The case in Year Book 9 Henry VI, 53, may be taken as an example. It is there said: "If I come into a tavern to eat and he gives and sells to me beer and flesh which are corrupt by which I am put into a great sickness, I shall have against him my action on the case clearly, even although he made no guaranty to me."

Mr. Justice Blackstone had laid it down without citing any authorities that: "In contracts for provisions it is always implied that they are wholesome." 3 Bl. Com. 165.

In *Burnby v. Bollett*, 16 M. & W. 644 (decided in 1847), it had been decided that in the sale of the carcass of a pig by one not a dealer, where the carcass was inspected by the buyer, there was no implied warranty of soundness. Parke, B., in delivering the opinion of the Court of Exchequer in that case suggested that the cases in the Year Books depended on statutes repealed before the sale then in question making it an offense for victualers, butchers and other common dealers in victuals to sell corrupt victuals.

In *Emmerton v. Mathews*, decided by the Court of Exchequer in the same year and reported in the same volume (7 H. & N. 586) as *Bigge v. Parkinson*, it was held that in the sale of a carcass of meat by one who sold meat on commission for his consignors there was no implied warranty of soundness. This case, as reported in 7 H. & N. 586, would seem to go on the ground that one who sells meat as a factor for others is not a dealer. But in the report of this case in 5 L. T. (N. S.) 681, Pollock, C. B., is reported to have said that "the plaintiff bought on his own inspection," and in *Jones v. Just*, L. R. 3 Q. B. 197, 202, the decision in *Emmerton v. Mathews* was stated to have been made on the ground that the plaintiff selected the meat.

This was the state of the law on the subject when *Bigge v. Parkinson* came up for decision. *Bigge v. Parkinson* was a case where the plaintiffs, being ship owners, had chartered a ship to the East India Company to carry troops from London to Bombay. They had

made a contract with the defendant, who was a provision merchant, by which the defendant agreed to supply the ship with provisions and stores for the troops at so much a head. Under this contract the defendant had supplied provisions and stores which were unsound and unwholesome, and it was held that he was liable on an implied warranty that the provisions and stores supplied should be fit to be eaten.

The ground on which this conclusion was reached is thus stated by Cockburn, C. J., who delivered the opinion of the Court of Exchequer Chamber after time had been taken for consideration: "The principle of law is correctly stated in the passage cited from Chitty on Contracts (6th Ed.), p. 399. Where a buyer buys a specific article, the maxim "*Caveat emptor*" applies; but where the buyer orders goods to be supplied, and trusts to the judgment of the seller to select goods which shall be applicable to the purpose for which they are ordered, there is an implied warranty that they shall be reasonably fit for that purpose; and I see no reason why the same warranty should not be comprehended in a contract for the sale of provisions."

The rule thus laid down by Cockburn, C. J., in *Bigge v. Parkinson*, has been followed in all subsequent cases and is now established as the law in England on the question now before us.

The first proposition laid down in *Bigge v. Parkinson* is that there is no difference between a sale of provisions and the sale of other articles in respect to there being or not being an implied warranty that they are fit. In his opinion in *Bigge v. Parkinson*, Chief Justice Cockburn first states the general rule that *caveat emptor* applies where a person buys a specific article; he then states that where goods (not articles of food) are supplied under a contract and the buyer trusts to the judgment of the seller to select the goods, there is an implied warranty of fitness; he then decides that these rules apply to a contract to supply provisions. Since the decision in *Bigge v. Parkinson* the question of an implied warranty of wholesomeness in the sale of provisions always has been treated as a question to be determined by the application of the rules which obtain in case of the sale of other chattels, and not as an exception. See to that effect Chalmers, Sale of Goods Act (1893) 32. See, also, for example, Mellor, J., in the leading case of *Jones v. Just*, L. R. 3 Q. B. 197, 202; Fitz Gibbons, L. J., in *Wallis v. Russell*, (1902) 2 I. R. 585, 612.

The second proposition laid down in *Bigge v. Parkinson* is that the rule which makes a dealer liable for selling unsound provisions is the rule which is applied where a chattel (no matter what kind of

chattel it may be) is ordered of a manufacturer or dealer for a particular purpose. In such a case there is an implied warranty that the article furnished will be fit for the particular purpose.

It was settled before *Bigge v. Parkinson* was decided that this rule applied to dealers as well as to manufacturers. *Jones v. Bright*, 5 Bing. 533; *Gardiner v. Gray*, 4 Camp. 144.

We pause to point out the limitations of this rule and the principle on which it is based.

The rule was stated later with great accuracy by Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. D. 197, 202, in these words: "Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Brown v. Edgington*, 2 Man. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own."

The principle on which this rule is founded was stated by Lord Esher (then Brett, J. A.), in delivering the opinion of the Court of Appeal in *Randall v. Newson*, 2 Q. B. D. 102, to be this: Where a manufacturer or a dealer contracts to supply an article for a particular purpose and the purchaser trusts to his judgment and skill in the matter, the obligation really entered into by the manufacturer or the dealer, if written out, would be stated to be to supply an article fit for the purpose named; an article not fit for that purpose is not as matter of description the article called for by the contract. And since in the case put the obligation to supply an article fit for the purpose named is not stated in terms, the obligation to furnish such an article is an implied and not an express term or condition of the contract.

It is not accurate, therefore, to say that there is an implied warranty of fitness in case of an order for goods for a particular purpose, to be furnished by a manufacturer or a dealer. It is implied term or condition of the contract, not an implied warranty. See to this effect *Chalmers, Sale of Goods Act (1893)*, 31. It is so treated in the section of the *Sale of Goods Act (St. 56 & 57 Vict. c. 71)* in which this rule is stated:

"14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty of condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:

"1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

For a case like *Bigge v. Parkinson*, decided under the Sale of Goods Act, see *Frost v. Aylesbury Dairy Co.*, (1905) 1 K. B. 608.

There is one difference between a contract with a dealer to supply ordinary articles and a contract with a dealer to supply food. In a contract with a dealer to supply food it is not necessary to state to the dealer that the food is to be eaten. That goes without saying. A contract for the supply of food without stating the purpose for which the food is required stands on the same footing as a contract to supply other articles when a particular purpose has been stated to the dealer.

Bigge v. Parkinson was a case where goods were supplied under a pre-existing contract. But there is no difference between a dealer's supplying provisions under a contract previously made and a dealer's supplying provisions in response to an order to be accepted by shipping the provisions. The material fact is that the purchaser makes known to the seller that he relies on his skill and judgment in selecting the provisions ordered. *Beer v. Walker*, 37 L. T. (N. S.) C. P. 278, decided before the Sale of Goods Act, and *Burrows v. Smith*, 10 Times R. 246, decided since that Act was passed, were cases of orders. To the same effect see *Grove, J.*, in *Smith v. Baker*, 40 L. T. (N. S.) 261, 263.

Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and if they are so ordered he is liable if they are not fit to be eaten. That was decided in *Wallis v. Russell*, (1902) 2 I. R. 585. In that case the plaintiff sent her granddaughter to buy two nice fresh crabs for tea. The granddaughter went to the defendant, a dealer, and delivered the message. The defendant's assistant selected two. Thereupon the granddaughter, pointing to a third crab, asked the assistant if he did not think that it was a better one. The assistant took it up, felt it, said it was by the weight one should judge and not the size, and put it aside. The granddaughter testified that she

relied altogether on the assistant's judgment. In answer to a question put by the presiding judge, the jury found that the plaintiff, through the granddaughter, relied on the defendant's assistant to select fresh and reasonably fit crabs. They also found that the plaintiff, through the granddaughter, had an opportunity to examine the crabs at the time of the sale and that the defendant honestly believed that the crabs were fresh and fit for food. There was no contention that the defendant was negligent, and on the facts such a contention would have been futile. The plaintiff and her granddaughter ate the crabs and were both made violently ill. In an action brought by the plaintiff it was held by the High Court of Justice and on appeal by the Court of Appeal for Ireland that she could recover. This case arose under the Sale of Goods Act. But not only is that Act as a whole a codification of the law as it existed before, but the subsection in question (subsection 1 of section 14) is in substance and almost in terms the fourth rule laid down by Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197, 202, 203. If the purchaser who goes in person to the provision store in fact gives her order in such a way that she leaves the selection of the food to the seller's skill and judgment, we have a case which stands on the same footing as those where provisions are supplied under a previous contract or are shipped in pursuance of a written order.

The rule now established in England is that in the sale of an article of food by one not a dealer there is no implied condition or warranty that it is fit to be eaten. *Burnby v. Bollett*, 16 M. & W. 644; *Emmerton v. Mathews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. (N. S.) 261; *Cockburn, C. J.*, in *Bigge v. Parkinson*, 7 H. & N. 955, decided before the Sale of Goods Act. Since the Sale of Goods Act, if the sale is made by one not a dealer there is no liability, by force of section 14.

If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract (*Bigge v. Parkinson*, 7 H. & N. 955), or in response to an order not given in person (*Beer v. Walker*, 37 L. T. (N. S.) C. P. 278; *Burrows v. Smith*, 10 Times R. 246; *Grove, J.*, in *Smith v. Baker*, 40 L. T. (N. S.) 261, 263), or even when the order is given in person in the dealer's shop, provided, as we have said, that the selection is left to the dealer. *Wallis v. Russell*, (1902) 2 I. R. 585.

But even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the

absence of knowledge by the dealer that the provisions are unsound) if the provisions are not fit for food. Mellor, J., in *Jones v. Just*, 3 Q. B. 197, 202; *Emmert v. Mathews*, 5 L. T. (N. S.) 681, and as interpreted by Mellor, J., *ubi supra*; Cockburn, C. J., in *Bigge v. Parkinson*, 7 H. & N. 955, before the Sale of Goods Act. Under the Sale of Goods Act this is so by force of section 14 because the case does not come within any of the subsections.

This brings us to a consideration of the law in Massachusetts outside the cases of *Howard v. Emerson* and *Giroux v. Stedman* already referred to, where this question was left open.

It is familiar law in Massachusetts that where goods are ordered of a manufacturer for a particular purpose within the rule stated more accurately in *Jones v. Just*, *ubi supra*, and in subsection 1 of section 14 of the Sale of Goods Act, there is an implied condition that they shall be fit for that purpose.

There is one case in Massachusetts where it has been laid down that the same rule applies in case of a dealer. *Hight v. Bacon*, 126 Mass. 10. The conclusion ultimately reached in *Hight v. Bacon* was that the goods there in question were specific articles bought on inspection by the buyer, and were not ordered by the buyer for a particular purpose trusting to the skill and judgment of the seller. But the rule stated above was laid down as applicable to a dealer as well as to a manufacturer, and that rule was stated to be the rule on which the case then before the court (a sale by a dealer) was to be decided.

The fact that in this class of cases the question is not, speaking accurately, a matter of implied warranty but of implied condition (as is stated at length by Lord Esher in *Randall v. Newson*, 2 Q. B. D. 102), is pointed out by Holmes, J., in *Murchie v. Cornell*, 155 Mass. 60, 63, 29 N. E. 207, and by Rugg, J., in *Leavitt v. Fiberloid Co.* (Mass.) 82 N. E. 682, 687 (2). These were cases of an implied

2. The facts in *LEAVITT v. FIBERLOID COMPANY*, (Massachusetts, November, 1907) 82 N. E. Rep. 682, are stated in the opinion by RUGG, J., as follows:

"The declaration contains two counts. The first count is in tort, and alleges that the defendant sold to the plaintiff certain comb stock known as "fiberloid," which it had negligently manufactured, whereby fire ensued while the stock was be-

ing used in the ordinary way, causing damage to the property of the plaintiff. The second count is in contract, and alleges that the plaintiff purchased of the defendant who was the manufacturer, fiberloid stock, respecting which the defendant made certain warranties, and that by reason of the stock not being as warranted it took fire, and caused the plaintiff damage.

"There was evidence tending to

condition that the thing sold was merchantable. The two sets of cases rest on the same principle.

In addition, Sewall, J., in *Emmerson v. Brigham*, 10 Mass. 197, 201 (decided in 1813), said: "Justice Blackstone (3 Bl. Com. 164, 165) has classed the cases of deceit and breaches of express warranties, in contracts for sales, under the head of implied contracts. He says it is constantly understood that the seller undertakes that the

show that the defendant manufactured a substance used for making combs, called in the trade 'fiberloid,' which both parties knew to be a highly inflammable material. The plaintiff was an experienced manufacturer of combs from this substance, and had bought such stock from the defendant for about three years. In January, 1905, certain stock was bought by the plaintiff of the defendant, which in manufacture worked badly, by blistering and igniting and later, but prior to March, 1905, an agent of the defendant said to the plaintiff, after the latter had made complaint of stock previously furnished, but not at the time any order for stock was given, that in the future 'the stock would be all right, he would guarantee it to be all right.' On October 13, 1905, after intervening purchases, the plaintiff ordered by mail certain stock of the defendant, a sheet of which, when put in process of manufacture in the ordinary way, caught fire, and caused the damage to other property of the plaintiff. In the Superior Court [Essex county] a verdict was directed for defendant upon the count in tort, and the case was submitted to the jury upon the count upon certain warranties, with instructions to the jury upon the count upon certain warranties, with instructions that the measure of damage was the difference in

value of the goods which the plaintiff ought to have had, and what he did in fact get, and that damage caused to other property of the plaintiff by the ignition of the sheet of fiberloid must be left out of consideration." * * *

The learned justice held that the verdict upon the count in tort was rightly ordered, and also that there was sufficient evidence to support a finding that there was an express warranty by the authorized agent of the defendant. On the latter point numerous authorities were cited. Continuing, the court said:

"The case was submitted to the jury upon the allegations both of express and implied warranty. The verdict was a general one. As a new trial must be had, at which it is conceivable that the jury might find for the defendant upon the issue of express warranty, and for the plaintiff upon that of implied warranty, it is necessary to determine the rule of damages upon this aspect.

"It is argued that under the circumstances disclosed there was an implied warranty on the part of the defendant that the stock purchased would prove to be reasonably safe for the uses to which it was put by the plaintiff. Where goods of a character commonly known in trade are ordered by description, and there is no inspection, there is an implied warranty that those furnished will be such as are mer-

commodity he sells is his own; and in contracts for provisions, it is always implied that they are wholesome; and in a sale with warranty, the law annexes a tacit contract that, if the article be not as warranted, compensation shall be made to the buyer; and if the vendor knows his goods to be unsound, and hath used any art to disguise them, or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an

chantable under the descriptive term used by the parties. The purchaser is entitled to get what he ordered. *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207; *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Gossler v. Eagle Sugar Refining Co.*, 103 Mass. 331. Where there is a sale by a manufacturer of a product, having a specific designation and reasonably capable of being so manufactured that it will contain no latent defect, then there is an implied warranty of merchantability, except where circumstances, as to inspection or otherwise, are such as to indicate that the buyer relies on his own judgment, and not the skill of the manufacturer. *Cunningham v. Hall*, 4 Allen, 268, 273; *Hight v. Bacon*, 126 Mass. 10. But if the article ordered is of a general character, and not for a specifically indicated purpose, even though the manufacturer may know that it was intended by the purchaser to be used in the process of further manufacture, there is no implied warranty that it shall answer the particular uses of the purchaser. *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58; *De Witt v. Berry*, 134 U. S. 306, 313, 10 Sup. Ct. 536; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46. The parties to the

sale in the present case were the manufacturer of fiberloid on the one side, and the manufacturer of combs, in whose business fiberloid was a necessary factor, on the other. Use of the goods purchased in this process of secondary manufacture may have been known to and in contemplation of both parties as the purpose of the purchase. The seller may have known, and the buyer have had a right to assume, that they were designed and reasonably fit to be used by the methods and under the conditions and with the instrumentalities common in that branch of manufacture. But there is nothing to show that the particular instrumentalities or factory conditions, as to exposed flame and other appointments, of the plaintiff were in contemplation of both parties in making the sale. If the goods sold by the defendant were of such a nature that, in the ordinary course of manufacture, they were liable to burst into flame, when subjected to the heat usually applied in process of further manufacture, and were not ordinarily manufactured so as not to have this character, then, in the absence of express warranty, everybody would be presumed to contract with reference to this attribute, and there would be no implied warranty against inflammability. If, with the likelihood to burst into flame under the conditions to which the plaintiff sub-

express warranty, and the vendor is answerable for their goodness. It is obvious that, in this very general classification, the details and examples are imperfectly introduced, and with some inaccuracy. It is not implied, in every sale of provisions, that they are wholesome, any more than it is in sales of other articles, where proof of a distinct affirmation seems, in Justice Blackstone's opinion, to be requisite. The contrary may be, and often is, understood between the

jected them made known, the goods would still have been properly describable in the market as fiberloid, and have been fit for sale and some valuable use under that designation, then the implied warranty of merchantability would have been satisfied. Under these circumstances they would not have been unfit for market, for sale, or for some profitable use. It was this principle which was applied in *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278. It would then be within the contemplation of the parties that the user of fiberloid for further manufacture would so arrange his factory that the bursting into flame of the material would cause no substantial damage. If, however, the goods as ordinarily manufactured, although highly inflammable, were not commonly liable to burst into flame when subjected to the usual heat in secondary manufacture, and there is no inspection or other circumstance showing that the parties are dealing with each other at arm's length, and the goods, possessing the characteristic of bursting into flame in the ordinary process of further manufacture, have no substantial value for any use and are not properly described in the market as fiberloid, then there is a breach of the implied warranty of the vendor, when he is the manufacturer, that the goods are merchantable or fit for the ordinary

uses to which goods of that name are put. Perhaps a more exact statement is that the seller has failed to perform his contract, by not delivering the thing, which he contracted to deliver, but has delivered a different thing. When such a situation exists, then the parties may be found to have contracted with reference to the possible results of such a breach of the contract. When there is no fraud or deceit, the ordinary rule of damages is that the plaintiff is entitled to recover the difference in value between the article which he bargained for and that which he received. *Bartlett v. Blanchard*, 13 Gray, 429; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342. But it may be found that the delivery of an article, having different qualities from that ordered, not discoverable by inspection, reasonably justified the plaintiff in using it as he would have used the article ordered and that thereby injury in excess of the value of the property bought ensued as a proximate result, and that such injury ought to have been apprehended by a prudent manufacturer and seller. If this be found to be so, the vendor may be compelled to indemnify the purchaser against whatever loss might have been anticipated to arise in the ordinary course of events from a failure to supply the goods ordered. For such a breach whether it be described as of con-

parties; and it is only when the false representation, to be proved in the one case, may be presumed or taken to be proved in the other, that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved, to entitle the suffering party to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions, as in any other case. The difference is that, in the case of provisions, the artifice is proved, when

tract to deliver or of implied warranty of merchantability, the rule of damage is the same as that heretofore stated in discussing the principles applicable to a breach of an express warranty, but with the limitations and qualifications there set forth. Whatever may be said as to weight of evidence in the case now before us, it cannot be ruled as matter of law that it is impossible for a jury to find that a natural consequence or a result, which may be found to have been within the contemplation of the parties, as likely to follow from failure to deliver such fiberloid as was ordered, was a fire in the plaintiff's factory. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 118, 3 Sup. Ct. 537; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Jones v. Padgett*, 24 Q. B. D. 650; *Jones v. Just*, L. R. 3 Q. B. 197; *Shepherd v. Pybus*, 3 Man. & G. 868; *Drummond v. Van Ingen*, 12 Appeal Cases, 284.

"Two questions of evidence have been argued. One Nims, a chemist, employed and called as a witness by the defendant, had testified that washing was an important part of the process of manufacture for the purpose of reducing acid in the stock, and not to render it less inflammable. He was thereupon asked, in cross-examination, how many men were employed in washing in the defendant's plant, the offer being made to show that in the practical working of the de-

fendant's plant there was a great difference in the stock put out. Upon this question and offer the court ruled: 'I will exclude the question and save the exception as to how many men they have at work in washing off the acid.' It is to be observed that the ruling was upon the specific question as to the number of men, and not upon the broader offer of proof. The number of men employed in a particular process at the defendant's factory had no probative force upon any of the issues in dispute. Any restriction of inquiry respecting such a collateral matter was within the discretion of the trial court. The defendant argues that certain correspondence between the plaintiff and defendant covering a period of time between January 20, 1905, and March 14, 1905, should have been excluded. So far as the contents of any of these letters are material or harmful to the defendant, they bear upon the relations existing between the parties at or about the time of the alleged warranty, and were admissible as tending to throw some light upon its scope and the circumstances under which it was given." * * *

A new trial was granted on the question of damages. ARTHUR WITHINGTON and R. E. BURKE, appeared for plaintiff; JOHN H. CASEY, N. N. JONES, and ERNEST FOSS, for defendant.

a victualer sells meat as fresh to his customers at a sound price, which at the time was stale and defective, or unwholesome from the state in which the animal died. For, in the nature of the bargain, the very offer to sell is a representation or affirmation of the soundness of the article, when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade." *Emmerson v. Brigham* was decided for the defendant because there was no evidence that the defendant knew of the unsoundness.

The statement that offering articles of food for sale is of itself a representation that the articles offered are believed to be sound was repeated in *Winsor v. Lombard*, 18 Pick. 57, 62, it was on this ground that *French v. Vining*, 102 Mass. 132, was decided for the plaintiff, and it was assumed in *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, where the only question left to the jury was the defendant's knowledge that the pigs were diseased.

Field, C. J., in *Bowe v. Hunking*, 135 Mass. 380, 384, said that "*French v. Vining*, 102 Mass. 132, rests upon negligence or upon an implied warranty that the hay was fit to be fed to cows." It does not appear in the report of that case nor in the original papers that the defendant in *French v. Vining* was a dealer. *French v. Vining* therefore cannot stand "upon an implied warranty that the hay was fit to be fed to cows." There is no implied term or condition that articles of food sold by one not a dealer are fit to be eaten. *Howard v. Emerson*, 110 Mass. 320, and *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538. The opinion in *French v. Vining* purports to decide the case on the ground of fraud and deceit; and in the subsequent cases of *Trambly v. Ricard*, 130 Mass. 259, 260, *Giroux v. Stedman*, 145 Mass. 439, 443, 14 N. E. 538, and *Martin v. Richards*, 155 Mass. 381, 384, 29 N. E. 591, *French v. Vining* is either stated to be or is treated as being a case of fraud and deceit. The difficulty in *French v. Vining* was to make out that under the circumstances disclosed there was proof of the *scienter*. The court decided that there was. It ought to be noted that in the subsequent case of *Provost v. Cook*, 184 Mass. 315, 15 Am. Neg. Rep. 78, 68 N. E. 336, which purported to follow *French v. Vining*, it appears from the original papers that the defendants were dealers in grain. The article of food there sold was oats.

The decisions on the question now before us in the United States outside Massachusetts are not many, and they do not deal with the question at length.

There is much in these opinions in conflict with what is now the

settled law in England. So far as decisions go, however, there is but one in conflict with that rule. That is the decision in *Hoover v. Peters*, 18 Mich. 51. In that case it was held that in the sale of food for immediate domestic consumption there is an implied warranty that it is fit to be eaten although the sale was made by one not a dealer. That is not law in Massachusetts. *Howard v. Emerson*, 110 Mass. 320; *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 586. No cases are cited in the opinion and there is a dissenting opinion by Christiancy, J., on the ground that to make out a liability in a sale of provisions the vendor must be a dealer or it must be proved that the defendant knew the provisions to be unsound.

In *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468, 7 Am. Dec. 339 (decided in 1815), it was held that the plaintiff, who had bought a piece of beef which proved to be unwholesome, had purchased it from one who apparently was not a dealer. It was held that the plaintiff could recover on the authority of the statement in Blackstone's Commentaries, and because "the verdict settles the facts that the beef was unsound and unwholesome and that the defendant below knew the animal to be diseased." This case has been followed in some subsequent cases.

In *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210 (decided in 1898), it was held that in a sale by a dealer there is an implied warranty.

Goad v. Johnson, 6 Heisk. (Tenn.) 340, referred to in *Wiedeman v. Keller*, 171 Ill. 93, 98, 49 N. E. 210, as a case contrary to the decision there made, was a sale of live cattle on inspection.

We are of opinion that the rule stated above as that established in England is the true rule as to when there is an implied term or condition of soundness in the sale of food.

We are also of opinion that offering food for sale is in itself a representation that it is believed to be sound, and that where there is no implied term or condition of soundness the defendant is not liable unless he knew of the fact that the food sold was not fit to be eaten.

Coming to the case at bar and to the allegation that the fowl here in question was sold with an implied warranty that it was fit for food: To prove that allegation the burden was on the plaintiff to prove that in making the purchase here in question she relied on his skill and judgment in selecting the fowl. In other words, to make out that the purchase of the fowl in the case at bar was not the purchase of it as a specific chattel and that it was a purchase of the same kind as one where food is shipped under a previous contract or in fulfillment of an order (that is to say, where the buyer relies on

the seller's skill and judgment) as in *Wallis v. Russell*, (1902) 2 I. R. 585. It is enough to dispose of this case to say that the plaintiff did not sustain the burden of proof on that issue. The evidence did not disclose how or by whom the fowl was selected; all that is stated on that point is that "the plaintiff Mary Farrell went to the defendant's store at about 9:15 p. m. on Saturday, July 1, 1905, and purchased a chicken from one of the salesmen." Moreover, so far as the evidence went, it showed that in offering the fowls from which the one in question was selected the defendant did not offer to exercise his skill and judgment in supplying sound food. The fowl in question was bought from those exhibited on Saturday night in July, by the defendant, on a bargain counter, to be sold at fifty cents on the dollar. It is manifest that the defendant offered this meat for sale to avoid carrying it over Sunday in hot weather, and it is a fair inference that like all articles on a bargain counter the selection was to be made by the buyer. See in this connection the statement of Sewall, J., in *Emmerson v. Brigham*, 10 Mass. 197, 201, 6 Am. Dec. 109: "The difference is that in the case of provisions the artifice is proved when a victualer sells meat as fresh to his customers at a sound price."

2. The plaintiff's next contention is that the defendant knew that the fowl was unfit for food and that she is entitled to recover on that ground. There are no allegations that the defendant represented that the fowl was fit for food and that the plaintiff bought it relying on that representation. For that reason the ruling was right if made on the state of the pleadings.

But passing that by, there was no evidence that warranted a finding that the defendant knew that the fowl was unsound.

3. This brings us to the allegation that the defendant, "in the exercise of reasonable care and diligence, could and should have known that said fowl was unfit for food and the plaintiff says that in all the premises she was in the exercise of due care, but the defendant, its agents and servants were negligent."

In support of her contention that the defendant is liable here for negligence in selling her an unsound fowl the plaintiff relies on the rule that an apothecary is liable who sells a poison labeled as a harmless drug (as to which see *Norton v. Sewall*, 106 Mass. 143), and on the case of *Bishop v. Weber*, 129 Mass. 411.

The ground on which the apothecary is liable is that he deals in poisons. That is quite different from dealing in food which may become poisonous. That rule does not in our opinion apply to the sale of articles of food.

Bishop v. Weber, 129 Mass. 411, 1 N. E. 154, was a case where the plaintiff alleged in her declaration that the defendant had been employed as a caterer to furnish a supper to those attending the triennial celebration of the Handel and Haydn Society who should buy a ticket of him for the supper; that she purchased a ticket and was poisoned by food eaten by her and so furnished by the defendant; and that the defendant was negligent in the premises. To this the defendant demurred. It was assumed by the court that the declaration was in tort and not in contract, although the writ covered both tort and contract; and the only question discussed was whether the plaintiff, who was not a party to the contract, could maintain an action. It was held that she could, on the doctrine that an apothecary who marks laudanum paregoric is liable to a plaintiff (not a party to the contract) who swallows the laudanum in consequence of the label. There seems to be ground for holding that the declaration in *Bishop v. Weber* was good as a declaration on a contract between the plaintiff and the defendant. All that was decided in that case was that the declaration was good. Whether negligence is the ground for holding a caterer or innkeeper liable for serving poisonous food was not discussed.

Whatever may be the rule in respect to caterers in serving meals, there is no case in which it has been held that in the sale of provisions by a dealer the test of his liability is negligence. If the selection is left to the dealer due care by him is no defense. He is liable for latent unsoundness that could not be discovered. *Wallis v. Russell*, (1902) 2 I. R. 585. And see as to due care in the sale by a dealer of chattels not articles of food, *Randall v. Newman*, 2 Q. B. D. 102. As due care is no defense when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering these several articles he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability; no question of negligence is involved. The implied representation of soundness apart, there is no liability on a vendor of food to be selected by the buyer because he did not procure and offer for sale better food than he procured and offered for sale.

4. As the plaintiff in the third case, who bought the fowl, cannot recover, it is not necessary to consider the cases brought by the children.

The result is that the exception must be overruled.

So ordered.

LAYZELL v. J. H. SOMMERS COAL COMPANY.

Supreme Court, Michigan, June, 1908.

COAL MINE ACCIDENT—INCOMPETENT ENGINEER OF HOISTING CAGE—INTOXICATION—EVIDENCE.—In an action for injuries to plaintiff, an employee in defendant's coal mine, caused by the negligence of an alleged incompetent engineer whereby the cage was suddenly elevated, throwing the men out of it and into the coal hoppers, the negligence alleged being incompetency of the engineer and that he was a man addicted to the excessive use of intoxicating liquors, which facts were known to the defendant, it was *held* that evidence of the alleged habits of the engineer and defendant's knowledge thereof, was admissible as bearing upon the competency of the engineer to operate the machinery, and it was error to exclude such evidence (1).

SAME—ADMISSIONS OF MINE BOSS—STATEMENTS AFTER ACCIDENT.—But in such case it was not error to exclude testimony of plaintiff's witness to show statements of defendant's mine boss made on the night after the accident, relative to the competency and trustworthiness of the engineer.

MINING STATUTE—HOISTING CAGES—COMPETENT ENGINEER—ASSUMPTION OF RISK—FELLOW-SERVANT.—The Michigan statute, Pub. Acts 1905, No. 100, p. 143, section 3, provides: "That only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all the coal mines in this State." In an action for injuries to an employee in a coal mine caused by alleged negligence of an incompetent engineer in operating the machinery for hoisting the mine cages, such person being hired for other duties but allowed to act as engineer at times, it was *held* that the statute was explicit as the duties of a mine owner in employment of competent engineers and was not dependent upon the action of the mine inspector relating to notice of violation of any of the provisions of said statute. Therefore, where the statute has been violated, the defense of assumption of risk or negligence of fellow-servant cannot be asserted (2).

HOOKE, GRANT and MONTGOMERY, JJ., *dissented*.

1. For other "Mine Accidents" from the earliest period to 1907, see Vols. 13, 14, 15 and 16 AM. NEG. CAS. The *Michigan* cases are reported in 16 AM. NEG. CAS. Subsequent cases to date are reported in Vols. 1-21 AM. NEG. REP.

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) under the title "MINES" for mining accidents from 1897 to 1907.

2. On rehearing in *Layzell v. J. H. Sommers Coal Co.*, (Michigan, April, 1909) reported in 120 N. W. 996, the result in the case at bar was adhered to, the court reviewing the statute at length, opinions being rendered by McALVAY, J., (concurring in by BLAIR, C. J., and MOORE and BROOKE, JJ.) and OSTRANDER, J., (concurring in by GRANT and MONTGOMERY, JJ.). A dissenting view was

ERROR to Circuit Court, Saginaw County.

ACTION by Charles Layzell against the J. H. Sommers Coal Company. From a judgment for defendant, plaintiff brings error. The case is stated in the opinion. *Judgment reversed, and new trial ordered.*

ARGUED before GRANT, C. J., and BLAIR, MONTGOMERY, OSTRANDER, HOOKER, MOORE, CARPENTER and McALVAY, JJ.

F. E. EMERICK and W. J. NASH, for appellant.

W. J. LAMSON, for appellee.

McALVAY, J. — Plaintiff brought suit against defendant company to recover damages for personal injuries received by him on account of the negligence of the officers and agents of defendant. From a judgment entered for defendant upon an instructed verdict, plaintiff, upon writ of error, brings the case to this court for review.

Plaintiff was employed on March 2, 1906, and for some months prior thereto worked as a pump man in the coal mine of defendant at St. Charles, Michigan. At 9:30 P. M. of that day plaintiff was required by his duties to go down into the mine. In company with his helper, named McDonald, plaintiff entered the cage at the top of the shaft, and both men gave the proper signals to the man operating the levers in the engine room to be lowered down into the mine. This operator, instead of manipulating the machinery so as to lower the cage into the mine, did exactly the opposite, and pulled his lever so as to cause the cage suddenly and violently to be elevated, jerking it some 30 feet up the shaft and over the automatic tippie, a device for dumping coal, and throwing these men violently out of the cage into the coal hoppers, causing plaintiff serious and permanent in-

held by HOOKER, J., who adhered to his former opinion (see case at bar).

The rulings on rehearing in the LAYZELL case are stated in the syllabus to the report in 120 N. W. 996, as follows:

"Under Pub. Acts, 1905, p. 143, No. 100, section 3, providing that only a competent engineer shall be permitted to operate the hoisting devices in coal mines, where a mine owner or operator hires a person who was not an engineer to perform other duties, and allowed him to act as engineer at times, it is a violation of the statute.

"In an action for injuries to a miner from the negligence of an employee acting as hoisting engineer, evidence held to show that such employe was not a competent engineer, but was hired as a fireman and was required to leave all that work and act as engineer as occasion required during the night shift when no regular engineer was present.

"The responsibility as to the good policy of law rests with the Legislature; the duty of courts ending with the ascertaining and declaring of the legislative intent."

juries. The man operating the lever which controlled the cage and hoisting device in this coal mine on this occasion was named Saunders, and was employed as fireman. The defendant placed its regular engineer at this work during the daytime, and this fireman during the nighttime.

The negligence relied upon and charged against defendant was that the fireman, Saunders, was a common laborer, incompetent, and lacking skill to take charge of the cage and hoisting devices used in this mine, and was a man addicted to the excessive use of intoxicating liquors, and was known to defendant's officers and agents to be reckless, unreliable, drunken, and incompetent to perform said work. The declaration also charged that defendant was negligent in disregarding a statutory duty, imposed upon it by section 3, Act No. 100, p. 143, Pub. Acts 1905, entitled "An Act to provide for the protection of the health, lives and interests of the coal miners of Michigan, and to provide for the inspection of all coal mines in this State," which provides: "Sec. 3. That only a competent and trustworthy engineer shall be permitted to operate the cage and hoisting devices in all the coal mines in this State." The plea of the defendant was the general issue. Such errors assigned as are material to the determination of the case will be considered.

In directing the verdict for defendant the court in his charge, among other things, said: "Now, then, in this case counsel endeavored to distinguish this case from the common-law rule, which I have stated to you by referring to certain authority in this State and out of it. * * * And they cite, to sustain that position, the law of this State which was passed in 1905, known as Act No. 100, in which one section says: 'Sec. 3. That only a competent and trustworthy engineer shall be permitted to operate the cage and hoisting devices in all coal mines in this State.' And they plant their right to recover upon that provision of the statute. Now the cases where the court has said in this State that the plaintiff might recover, and that there was no assumption of risk, where the statute provided that the duty that the employer should perform toward the employee for his protection was the case where the statute contained a penalty for the violation of it. * * * There is no penalty in this statute for the failure to perform." The court then quoted the last section of the Act, making it a misdemeanor to refuse to comply with a certain notice, and proceeds: "So the employer is not guilty of a misdemeanor until the State mine inspector has notified him, and that he has failed to comply with the notice to do so within a reasonable time."

The case cited and quoted from in his charge, and upon which the court relied (*Walkowski v. P. & G. Consol. Mines*, 115 Mich. 629, 73 N. W. 895), was decided before any statute was enacted imposing a duty upon the employer as to operating cages and hoisting devices in coal mines, so no question was in that case as to the neglect of duty, and the case is not in point. The construction of the court was that the statute invoked by plaintiff contained no penalty, and therefore the neglect of the duty imposed did not bring the case within the cases relied upon by plaintiff. In *Swick v. Aetna Portland Cement Co.*, 147 Mich. 457, 111 N. W. 110 *et seq.*, where a similar contention is discussed under a similar statute, the conclusion of the justice concurring in the opinion is that the statute imposed the duty without reference to the action of the factory inspector, and in case of neglect of that duty the doctrine of assumed risk could not be asserted as a defense. In this conclusion we concur. This statute does not make the performance of the duty depend upon the action of the mine inspector. It is imposed by the third section of the Act without condition, and without reference to the steps necessary to be taken in order to penalize parties for their neglect. This section of this statute imposed the duty upon defendant to employ an engineer, competent and trustworthy, and to permit only such a one to operate the cage and hoisting devices in its mines. The legislative intent, in providing for the protection of the lives of miners, is clearly expressed in this section. The intention is not to allow the employment of any man, and put him at work to learn his trade as engineer, but that the man put at this work must be then a competent and trustworthy engineer. Plaintiff had a right to rely upon the performance of this duty by his employer. It is not a question of the care used by the defendant in its selection if the person selected was not "a competent and trustworthy engineer;" for the reason that, under the statute, such is the only selection provided for. This is not an insurance that accidents will not occur, but an insurance that the employee selected is within the class designated by the statute. It follows that, if the statute has not been complied with, the defense of assumption of risk, or negligence of a fellow-servant, cannot be asserted. The court was in error in directing a verdict for defendant. The case should have been submitted to the jury, with instructions conforming with the views above expressed.

The court was also in error in excluding evidence of the habits of Saunders as to the excessive use of intoxicants, if within the knowledge of defendant's officers and agents, or of so notorious a

character that they should have known of such habits. It was material as bearing upon his competency and trustworthiness. The testimony of the machinist and blacksmith should have been admitted for the same reason. It was not error to exclude the testimony of plaintiff's witness to show statements of defendant's mine boss, Jenkins, made on the night after the accident, relative to the competency and trustworthiness of Saunders. In view of the foregoing statements in this opinion the other errors assigned need not be discussed.

The judgment is reversed, and a new trial ordered.

CARPENTER, BLAIR, OSTRANDER and MOORE, JJ., concurred.

HOOKE, J. (*dissenting*). — The plaintiff was injured by being raised in defendant's mine hoist, and dumped over the "tipple." The cause was the shifting a lever in the wrong direction, through mistake, by defendant's employee in charge of the hoist. The plaintiff was seriously hurt, and charges negligence upon the defendant. Our statute (Pub. Acts 1905, p. 142, No. 100) is relied upon. The title of the Act to which it was amendatory was "An Act to provide for the protection of the health, lives and interests of the coal miners of Michigan, and to provide for the inspection of all coal mines in this State." Section 3 provides: "That only a competent and trustworthy engineer shall be permitted to operate the cage and hoisting devices in all coal mines of this State." Section 36 provides: "Any owner, part owner, operator, manager, or superintendent of any such coal mine, or director or officer of any stock company owning or operating any such mine, who shall wilfully violate any of the provisions of this law by omitting to comply with any of its said provisions, after a reasonable length of time after notice of such omission by the State mine inspector, shall, if not otherwise provided for, be deemed guilty of misdemeanor, and upon conviction thereof shall be punished," etc. The negligence relied upon is the failure of the defendant to employ "a competent and trustworthy engineer" to operate the hoist; and counsel say in their brief: "Our position in this case is that, under the evidence, the sole question at issue was and is the competency of Saunders. The statute imposes a specific duty to provide at this post a competent and trustworthy engineer. If the man Saunders was in fact incompetent and untrustworthy, either or both, the plaintiff was entitled to recover. Under this statute it is no defense to say defendant had no notice or knowledge of such incompetency or untrustworthiness. It is no defense to say that plaintiff had knowledge of such incompetency and should have imparted the knowledge to

defendant. It is no defense to claim that plaintiff assumed the risk of negligence of a fellow-servant. All of these questions we assert were eliminated from the case by the effect and operation of the statute, and that, therefore, the manner and cause of the injury not being disputed as being the negligent act of Saunders, not in any wise contributed to by any want of care on the part of plaintiff or the other man in the cage, or any defect in the machinery, and there being positive evidence in the case of the incompetency of Saunders at and before the time of the injury in this employment, the case should have been submitted to the jury."

Plaintiff's counsel claim, first, that there was evidence showing that Saunders was not an engineer, and therefore that the jury might find that defendant had not complied with the statute and was liable. They also claim that there was evidence that Saunders was incompetent to run the elevator, and that he was a man who habitually made use of intoxicating liquor while at work, which tends to show untrustworthiness. As indicated by the quotation from the brief, it is plaintiff's claim that the statute imposed a positive duty to secure a competent and trustworthy engineer at the master's peril. The statute in question should not be held to impose upon the mine owner the obligation of infallibility in the selection of employees, unless we are prepared to say that it was intended to make him an insurer. It may reasonably be held that it was the legislative design to require the employment of an engineer, competent and trustworthy; but we see no indication of an intention to abrogate the general rule that only reasonable care and diligence in ascertaining the qualifications are required to relieve from the charge of negligence. The case of *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270, 28 Atl. 1087, 1088, is substantially on all fours with this case; the statute in that State being very similar to our own. It was there held that it had not the effect to change the common law relating to negligence in the employment of men. Apparently the statutes are from a common source, if our statute was not framed upon the Pennsylvania model. This construction was practically given in the *Walkowski Case*, 115 Mich. 630, 73 N. W. 895.

The defendant offered testimony tending to show that Saunders was a competent engineer when he was hired. Its officers made inquiries regarding his habits, competency and trustworthiness. Lawson, Saunders' stepson, himself a man of experience with engines, told them that Saunders had fired and run an engine at Coleman, and fired in a sawmill; that he claimed to be an engineer, had run an

engine all his life, and that he personally knew that he had run an engine two years; that he was a straight, reliable man, and he considered him all right. This witness understood that it was the general custom for the head fireman to run and operate the cage or hoists at night. Beecher, defendant's officer, who hired Saunders, testified that he knew Saunders eighteen months before hiring him, and before he hired him he talked with Mr. Rolfe, a relative of Saunders, about his age, experience, and strength, and was told that he was steady, reliable, and experienced, and had run a locomotive. When Beecher employed him, he first set him to work as assistant fireman. He worked satisfactorily at that for two or three months, and then he made him a head fireman, "his duties as head fireman to be first engineer as much as anything else." He was held responsible for the operation of the plant at night. He ran the engines for the fans to ventilate the mine, one for the generator, and one for the hoist, and he did this for at least fourteen months before the accident. He did this under Beecher's supervision, who never discovered anything wrong with him and never heard any complaints. We discovered no contradiction in the testimony in relation to defendant's care. The only evidence which is offered upon the subject of Saunders' competency and trustworthiness is that of two other employees, who said that he had a bad reputation among the men, and that he used intoxicating liquor while at work, but both admitted that they did not inform defendant's officers of it, which they would perhaps be unlikely to do, as they belonged to the same union with the plaintiff. Of the two who did testify that they thought him unfit, one gave the reason that he was "nutty," which he explained to mean had mad fits. This witness said he had spoken about it to other employees, but never to any representative of the company. The other told what some shift boss had said when told of the accident, which was hearsay testimony, not admissible. It was also said that he sometimes let the cage strike the ground hard, but no one seems to have informed the officers of that. I am of the opinion that the uncontradicted testimony showed an absence of any negligence in the employment of Saunders to do this work, in addition to which there is evidence of fourteen months' subsequent satisfactory service, which we have said to be the best evidence of competency. See *Walkowski v. P. & G. Consol. Mines*, 115 Mich. 630, 73 N. W. 895. It is conclusively proved that Saunders was an engineer, every way competent to run the hoisting apparatus and the engine, and that the only thing lacking was infallibility. We held in the case last cited that: "The fact that an employee, after

operating machinery correctly for several months, forgot on one occasion, and turned a brake the wrong way, thereby causing injury to a fellow-servant, has no tendency to show incompetency. Evidence that the fellow-servants of an employee, in the retention of whom the master is alleged to have been negligent, had talked among themselves that he did his work improperly is not admissible to prove general reputation for incompetency."

There is no evidence that he was not a trustworthy man. Why he made the mistake does not appear. It is not shown that he was angry, "nutty," as Van Sickel called it, nor is there any evidence that he was intoxicated, neither is there anything to indicate that his management of the engines had anything to do with it; so, if there had been negligence in the matter, it could hardly be said that such negligence caused the accident. It was said in *Walkowski v. P. & G. Consol. Mines*, 115 Mich. 630, 73 N. W. 895, that: "Evidence that the person in charge of the brake by which was controlled the hoisting and lowering of the passenger cages in a mine was in the habit of lowering the cage at too great speed is not admissible upon the question of his incompetency, in an action for injuries caused by his turning the brake the wrong way and letting the cage fall." Under the proof in this case it was the duty of the trial judge to say that defendant had shown due care in the employment of Saunders. *Walkowski v. P. & G. Consol. Mines*, 115 Mich. 633, 73 N. W. 895. If he was negligent, the plaintiff's action should have been brought against him. He has signally failed to prove negligence on the part of defendant.

The judgment should be affirmed.

GRANT, J., concurred with HOOKER, J.

MONTGOMERY, J. — I concur in the view that the defendant is not an insurer of the competency of the engineer, and that the employer discharges his duty when proper care is exercised in the employment and selection of the servant.

WALLER v. ROSS.

Supreme Court, Minnesota, January, 1907.

1. NEGLIGENCE — FALL OF AWNING — INJURY TO TRAVELER. — In the absence of any issue as to nuisance, the liability of the owner of a building for damages to a traveler on a highway, caused by the falling of an awning attached to that building, is to be

determined upon the principles of negligence in accordance with the maxim "*res ipsa loquitur*," and not upon the doctrine of insurance of safety (1).

2. INSTRUCTIONS. — The maxim applies to the facts in this case. The instructions of the trial court, taken as a whole, did not give to the plaintiff the legitimate benefit of that rule.

(*Syllabus by the Court.*)

APPEAL from District Court, Hennepin County.

ACTION by Carrie Waller against Loring T. Ross. From a verdict for defendant, and from an order denying a new trial, plaintiff appeals. The facts appear in the opinion. *Reversed.*

AYERS & McDONALD, for appellant.

HARRISON E. FRYBERGER, for respondent.

JAGGARD, J. — This was an action for personal injuries claimed to have been sustained by plaintiff and appellant while she was walking upon the sidewalk on a public street in Minneapolis. While plaintiff was in front of a building of defendant and respondent, an awning which had been attached to that building fell and struck her, and caused the damages for which recovery was here sought. Defendant had a verdict. Plaintiff appealed from an order denying her motion for a new trial (2).

The plaintiff argues that the rule of law applicable is that when the plaintiff's evidence showed an injury sustained by her while a

1. See NOTE ON THE DOCTRINE OF *RES IPSA LOQUITUR*, with numerous illustrations of American and English cases, in 3 AM. NEG. REP. 488-496; also notes of cases on the rule, in 6 AM. NEG. REP. 53-54, and 19 AM. NEG. REP. 182-184.

See also Vols. 1-21 AM. NEG. REP., for cases bearing on the rule (1897-1907).

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) under the title "*RES IPSA LOQUITUR*."

2. *Fall of awning upon person on sidewalk.* — In *McCROREY v. GARRETT*, (*Virginia*, June, 1909) 64 S. E. Rep. 978, an action for injuries sustained by plaintiff from the falling of an awning, it appeared that defendant was the lessee of a storehouse situated on the north side of Main street, in the city of Norfolk, in

which he conducted a mercantile business. On the front of said store he had erected an adjustable awning, called "Coyle's frame," fifty feet in length and weighing 250 pounds. The flaps of the awning were elevated above the street seven feet, and the awning when lowered projected from the building over the sidewalk about five feet. On the day of the accident, a high wind was blowing, and, as the plaintiff was walking along the north side of Main street, the awning fell and struck him, causing the injuries complained of. On the trial of the case in the Law and Chancery Court of City of Norfolk, plaintiff recovered judgment for \$2,000, which on appeal by defendant to the Supreme Court of Appeals was *affirmed*. The Su-

passenger upon the street, because of the falling upon her of an awning, the burden of proof shifted to the defendant, and that it was incumbent upon the defendant to show, first, that the accident was unavoidable; or second, that the plaintiff was not injured, before he would be relieved from liability on account of the accident. That is to say, plaintiff invokes the doctrine of insurance of safety as announced in *Rylands v. Fletcher*, L. R. 3 H. L. 330, and would hold the owner of an awning which did damage to a person properly using the street absolutely responsible notwithstanding the exercise of due care on his part. In support of that contention he cites *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, in which the Federal Supreme Court quotes as follows from an English decision, namely: "A man who for his own benefit suspends an object or permits it to be suspended over a highway and puts the public safety in peril thereby is under an absolute duty to keep it in such state as not to be injurious." That English case was *Tarry v. Ashton*, 1 Q. B. Div. 314. It is to be noted, however, that there the jury had found negligence on part of the defendant personally. The lamp overhanging the highway, which fell and injured the plaintiff, a foot passenger, was out of repair through general decay, although not to defendant's knowledge. The court also referred with approval to the leading case of *Kearney v. London B. &*

preme Court (per HARRISON, J.), among other points, *held*, that:

"It is well settled that public highways, whether they be in the country or in the city, belong, not partially, but entirely, to the public at large, and that the supreme control over them is in the Legislature. It is also an established general rule that any unauthorized obstruction which unnecessarily impedes or incommodes the lawfulness of a highway is a nuisance at common law. *City of Richmond v. Smith*, 101 Va. 161, 43 S. E. 345, 13 Am. Neg. Rep. 465.

"So far as the right of the public to travel unmolested over the highway is concerned, the dominion of the people is absolute, and is not confined to obstructions on the surface of the street, but extends with equal emphasis to encroachments

upon the public right either below or above the surface. Indeed, an obstruction above the street that may injure the traveler is more dangerous than one on the ground, because the latter is more readily seen and avoided."

After citing several cases the court said: "Unless justified by legislative authority, the owner of an awning erected and maintained over a public street becomes as to persons lawfully using the street an insurer. He maintains the same at his own peril, and any one receiving an injury from such awning, being himself free from blame, has a good cause of action against the owner thereof, regardless of the question of his negligence in the construction and maintenance of such awning."

S. C. Ry. Co., L. R. 5 Q. B. 411, L. R. 6 Q. B. 759, 762, as being directly in point, and as holding that the doctrine of *res ipsa loquitur* applied to the case of plaintiff injured, while walking on a public highway, by a brick which fell from a pier of defendant's bridge. That case is an authority for the doctrine of *res ipsa loquitur* in such cases, but not for the doctrine of insurance of safety. Gleeson v. Virginia Midland Ry. Co. itself held a railway company responsible for negligence in maintaining a cut with sides of the character shown by the evidence in that case, because of which loosened earth obstructed the track and derailed the train on which plaintiff was a passenger, whereby he was injured. Not the facts nor the theory, nor the cases cited therein, tend to support the contention of absolute liability in this case; but, on the contrary, sustain the application of the maxim "*Res ipsa loquitur*." A large number of cases have been presented to the courts in which a body of considerable weight has been suspended or put in position where it is likely to fall, and has, in fact, fallen and produced damage to a person lawfully using a highway. The liability of the person responsible for such damages has been, under different circumstances, determined upon the doctrine of insurance of safety, of nuisance, of *prima facie* negligence, or rarely of ordinary negligence. While there is not entire unanimity of opinion either as to the correct principle to be adopted or as to its application, the marked tendency of the decisions is to base liability in such cases upon culpability, and not to extend absolute responsibility to which the exercise of reasonable care is no defense to cases in which there is no necessary or inherent tendency of the thing of weight to do considerable harm. The logic of damage from falling things of weight, according to the prevailing view, leads to the application of the maxim "*Res ipsa loquitur*." "The most apt and concise statement of that rule" (7 Words and Phrases, 6139) is to be found in Scott v. London & St. K. Docks Co., 3 H. & C. 596. The plaintiff, passing a warehouse, was hurt by the falling of barrels of sugar. The court said: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen, if those who have the management used proper care, it affords reasonable evidence, in the absence of explanation of the defendant, that the accident arose from the want of care." The same principle has been applied to persons passing on a highway injured by a falling barrel (Byrne v. Boadle, 2 H. & C. 722; cf. Welfare v. London & Brighton Ry. Co., L. R. 4 Q. B. 693, and see White v. France, 2 C. P. Div.

308; *Briggs v. Oliver*, 4 Hurl. & C. 403); by a falling sign (*Morris v. St. W. Co.*, 8 Hun, 1, 30 N. Y. Supp. 571; *Railway Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, cf. *Taylor v. Peckham*, 8 R. I. 349, *Salisbury v. Herchenroder*, 106 Mass. 458; *Jones v. City*, 104 Mass. 75); by an iron guard (*Mentz v. Schieren*, 74 N. Y. Supp. 889); by a limb from an ornamental tree (*Weller v. McCormick*, 52 N. J. Law, 470, 19 Atl. 1101, 8 L. R. A. 798; by an iron beam (*McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464); by a falling derrick (*Scheider v. American Bridge Co.*, 79 N. Y. Supp. 634); and by a broken bolt on an elevated railway (*Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 31 N. E. 870). This view of the law has received the sanction of many decisions in which the damage was done by ponderous objects falling upon persons lawfully at the place to whom a duty was owing and who had assumed no risk. It would uselessly incumber to collate them. See *Kaples v. Orth*, 61 Wis. 531, at page 535, 21 N. W. 633, as to the fall of a block of ice; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 12 Am. Neg. Rep. 143, 9 Id. 336, 7 Id. 117, as to fall of cable and elevator counter balance; *The Joseph B. Thomas*, 81 Fed. 586, 4 Am. Neg. Rep. 105, as to the fall of a water keg.

The rule of *res ipsa loquitur* has been constantly applied to damage done to one lawfully using a highway by the falling of buildings or parts of buildings. The common acceptance of this view in the two leading cases on the subject (*Ryder v. Kinsey*, 62 Minn. 85, 64 N. W. 94, and *Mullen v. St. John*, 57 N. Y. 567, is especially significant because the doctrine of *Rylands v. Fletcher*, *supra*, has been accepted in Minnesota and essentially rejected in New York. See, also, *Travers v. Murray*, 84 N. Y. Supp. 558, as to the falling of a chimney; but see *Bramwell, B.*, in *Nicol v. Marshland*, L. R. 10 Ex. 255, quoted in *Gorham v. Gross*, 125 Mass. 232, 239, and *Isherwood v. H. L. Jenkins Lumber Co.*, 84 Minn. 423, 87 N. W. 931, 11 Am. Neg. Rep. 21, as to the falling of a pile of lumber. And, generally, see *Martin v. Dufalla*, 50 Ill. App. 371; *Kappes v. Appel*, 14 Ill. App. 170; *Patterson v. Jos. Schlitz Brewing Co.*, (S. D.) 91 N. W. 336. There is no inconsistency with this rule in holding a person responsible for damages done by a falling wall on principles of nuisance under appropriate circumstances. See *Simmons v. Everson*, 124 N. Y. 319; *Wilkinson v. Detroit, etc. Works*, 73 Mich. 405, 41 N. W. 490; *Miles v. City*, 154 Mass. 511, 28 N. E. 676, *Murray v. McShane*, 52 Md. 217. And see *Lauer v. Palms* (Mich.) 98 N. W. 695; *Chute v. State*, 19 Minn. 271 (Gil. 230); cf. *Nordheim v. Alexander*, 19 Can. Sup. Ct. 248. So, also, the liability for damages caused by the falling

of a cornice has been determined under the rule *res ipsa loquitur* or by the principles of nuisance. *Roberts v. Mitchell*, 21 Ont. App. 433, 436, per OSLER, J.; *Grove v. Fort Wayne*, 45 Ind. 429. It is true, as is argued by counsel for the plaintiff, that the liability of the owner of a roof constructed so that it will inevitably, at certain seasons of the year, and with more or less frequency, subject innocent travelers to damage or danger, may be found without reference to reasonable diligence upon the principle of *Rylands v. Fletcher*, *supra* (*Shipley v. Fifty Associates*, 101 Mass. 252, 106 Mass. 199; *Smethurst v. Church*, 148 Mass. 261, 19 N. E. 387, *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475), or of nuisance (*Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657; cf. *Lowell v. Glidden*, 159 Mass. 317, 34 N. E. 459). But see *Garland v. Towne*, 55 N. H. 56. The inherent and necessary tendency of a roof's eaves overhanging a highway to do harm, however, varies materially from the tendency of the ordinary awning to fall. That natural difference is a good foundation for the distinction between the legal principles of liability applicable to the respective owners for consequent damages. The same reasoning which holds the owner of such a roof responsible for damages without reference to culpability justifies the holding of the owner of such an awning in an action for negligence responsible on the theory of *res ipsa loquitur* only. It is true that the owner of the building to which the awning is attached may be held responsible for damages to a passer-by due to its fall, on the doctrines of nuisance. See *Hume v. Mayor*, 74 N. Y. 264. In the case at bar, however, the pleadings, the evidence, the assignments of error, and the brief on appeal present no question as to the liability of the defendant on the ground of nuisance. Under the circumstances we conclude that the theory of *res ipsa loquitur* was as favorable to the plaintiff as would have been proper under the circumstances.

The remaining assignments of error concern the charge of the court. While it is true that the trial judge did at one place correctly state the abstract doctrine of *res ipsa loquitur*, he did not adequately apply that rule to the facts in this particular case. In many other places, which are covered by the plaintiff's first five assignments of error, he gave the general rules of law applicable to an ordinary case of negligence, in which the burden of proof rests on the plaintiff and in which the mere happening of an accident is not evidence of negligence. The result, we have concluded, did not secure to the plaintiff the benefit of the rule of *res ipsa loquitur*. On the one hand, it is well settled that it is the duty of counsel to correct verbal in-

accuracies or obscurity or indefiniteness in a charge at the time it is given, and that, if he fail to call to the court's attention such matters at such time, he cannot subsequently predicate error on such grounds in the charge actually given. On the other hand, it is equally well settled that the trial court should not give undue prominence, by repetition or otherwise, to portions of the law applicable, and that, although unnecessary charges do not always constitute error, in the nature of things, undue emphasis upon correct, but inapplicable, rules of law, tend to mislead the jury and may result in an unfair trial. 11 Am. Enc. of Plead. & Prac. 297, 299. Whether or not such undue emphasis so resulted is to be determined by an examination of each record. In the case at bar a *prima facie* case of negligence was clearly made out, and plaintiff showed that she had received at least some injury. Defendant offered little or no evidence to rebut the inference of negligence. The fact that the jury found for the defendant is therefore significant. Taking the record as a whole, we have concluded that the charge was so misleading that the plaintiff should have a new trial.

Order reversed.

BREMER v. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, March, 1909.

1. STREET RAILROADS—RIGHT OF WAY OVER TRACKS—RIGHT OF PRIORITY OVER TRAVELER.—A street car company does not acquire by its conferred franchise a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. A street car and a footman or vehicle have equal rights of the same kind to the concurrent use of the city streets.
2. MUTUAL RIGHTS AND DUTIES WITH TRAVELER.—The rights and duties of both are reciprocal and mutual. Each is bound to exercise commensurate care in self-protection and in avoiding harm. Such care on the part of the street car company is differentiated from that of an ordinary user of the street, because its tracks make the side movements of its cars impossible, and because it is authorized to operate heavy cars, with powerful motive force, by reason of which the momentum and inertia of its cars differ from that of ordinary vehicles.
3. APPROACHING STREET CAR DISCHARGING PASSENGERS—DUTY OF MOTORMAN.—At a street crossing, or at a place used

as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind the other car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as are usually given to protect travelers who are in the exercise of ordinary prudence.

4. **PASSING BEHIND STREET CAR—CONTRIBUTORY NEGLIGENCE—"STOP, LOOK, AND LISTEN."**—The traveler on the street under such circumstances has the right to rely on the exercise of such care by the motorman, but is required to exercise due care in protecting himself and in avoiding harm. Such care does not amount to the caution required to be exercised where the highway crosses the track of an ordinary railway. The traveler is not under a hard and fast obligation to stop, or to look and listen.
5. **NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**—Where the evidence of the plaintiff shows actual negligence on the part of the company, and the question of contributory negligence of plaintiff depends on a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether contributory negligence should be found or not, the question should be submitted to the jury under proper instructions, and it is error in such a case for the court to direct verdict for the defendant.
6. **INJURIES TO PERSONS ON STREET CAR TRACK—PASSENGER STRUCK BY STREET CAR AFTER ALIGHTING FROM ANOTHER CAR.**—In this case plaintiff, a passenger on defendant street car company's west-bound car, arrived in daytime at a place not the intersection of streets, but which had been recognized and in this case was recognized by defendant as a place for discharging passengers. She followed another passenger, who had alighted before her, who crossed the track ahead of her in safety. Another car of defendant, which was loaded with crushed rock, passed the car from which plaintiff had alighted, and struck and carried her 100 feet from the point of collision. There was contradiction in the testimony as to the speed at which it was going and as to whether it gave the usual signals. In an action to recover for consequent personal injuries it is held that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury (1).

(Syllabus by the Court.)

1. *Passengers injured after alighting from cars.*—For actions arising out of injuries to passengers after alighting from cars, while crossing track, etc., see Vols. 2-7 AM. NEG. CAS., where the cases from the earliest period to 1896 are reported. Subsequent cases to date are reported in Vols. 1-21 AM. NEG. REP.

See also AMERICAN NEGLIGENCE DIGEST (1909 edition) where the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) are collated under titles, ALIGHTING and CARRIER OF PASSENGERS. Reference should also be made to COLLISIONS, CROSSINGS, STREET CARS, TRACK, etc., also the title "Stop, Look and Listen."

APPEAL from District Court, Ramsey County.

ACTION by Maria Bremer against the St. Paul City Railway Company. From a verdict for plaintiff, and from an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, defendant appeals. The case is stated in the opinion. *Order affirmed.*

W. D. DWYER and W. R. DUXBURY, for appellant.

McELWEE & HOLLIHAN, for respondent.

JAGGARD, J.—Plaintiff and respondent, a woman sixty-five years of age, was a passenger on a street car of defendant and appellant's railway company. The car stopped at her signal, at a point about half way between two cross streets, where plaintiff had often gone out of the car to attend to business. Another passenger had left the car in front of her, and passed behind it. She followed him directly and "wanted to follow him farther on." The car from which she alighted was going west. As she was going diagonally across the street, she was struck by an east-bound work car. She testified: "I heard nothing, no bell and nothing, and it hit me on the legs, and I fell down, and thereafter I didn't know anything more." The jury might have inferred that plaintiff collided with the east-bound car at a point four feet back of the tender; but her testimony and the circumstances in connection with the place of fracture and laceration of her right leg and the distance from its tender to the top of the rail were sufficient to have justified a finding that she was struck by the tender in front of the approaching car. It must be here assumed that it so found. The distance between the inside rails of the double tracks was such as to leave a clearance not to exceed eighteen to twenty-four inches between the cars when opposite to each other. One of the defendant's witnesses testified that the work car, loaded with crushed rock, was going only three or four miles an hour; but there was also testimony that the usual rate of speed at that point was ten to twelve miles an hour, and that the work car ran 100 feet after it struck plaintiff. The witness who alighted ahead of plaintiff heard and saw the construction car. Thereupon he "kinder obliqued to the left and crossed the track, and at the same time motioned to the party following him and also to the employee with his hand like this (indicating), and just about that time the front end of the car came between him and the party who followed, the lady, and he heard a scream and at the same time the application of the emergency brakes, or something of that kind." Other testimony on the point was more favorable to the plaintiff. The jury returned a verdict for plaintiff in the sum of \$2,000. This appeal was taken

from the order of the trial court denying defendant's motion in the alternative.

Defendant's negligence must be assumed. Its brief does not contend that actionable negligence was not shown. Moreover, as will appear from the consideration of plaintiff's negligence, which immediately follows, the question was for the jury. The only controversy here is whether plaintiff as a matter of law was guilty of contributory negligence. The primary fallacy, which in fact, although not in phrase, underlies defendant's contention that plaintiff was so guilty, and which is frankly avowed by some authorities cited to sustain it, is that a street railway company had some superior or paramount right on a public street to that of a passenger or driver of vehicles. This view, it is true, is supported by a more or less clearly defined group of cases which secure to a street car system power to use public streets almost equal to that of a railroad company to use its tracks. For example, see *Chicago, etc., Ry. Co. v. Meinheit*, 114 Ill. App. 497; *Denver Tr. Co. v. Norton*, 141 Fed. 599, 73 C. C. A. 1; *Gray v. Traction Co.*, 198 Pa. St. 184, 47 Atl. 945 (*post*); *Minnich v. Wright*, 214 Pa. St. 201, 63 Atl. 428, and subsequent discussion of rule as to "stop, look, and listen." Three considerations are currently relied upon to confer upon street railways the priority of way, viz., that their tracks necessitate a fixed course, which makes it impossible to turn cars to the side; that such companies are generally authorized to propel heavy cars by powerful motor force, in consequence of which the momentum and inertia of street cars differ from that of ordinary vehicles; and that general convenience demands rapid undeterred transit by such public service companies. Upon the most casual reflections, however, it will clearly appear that the conclusion does not follow from these premises. Due allowance may be made for all these considerations. The lawful use of streets by street cars on the one part, and by footmen and vehicles on the other, may be differentiated by due reference to these circumstances; and none the less the common-law rights of ordinary users of the highway, though somewhat modified by them, may still be preserved in substance. In other words, the common-law rules as to the use of public highways may be merely adapted to new conditions imposed by the weight, power, and tracks of a street car, its inability to move sidewise, and its momentum.

There is a natural and necessary difference between the fundamental right of an ordinary freight and passenger railroad to its right of way and the right of the street car company to use the streets of a city. The railroad company, by gift, voluntary transfer

for consideration, or condemnation with compensation, secures a fee of an incorporeal hereditament, and operates its roads by virtue of ownership; the street car company obtains a privilege to build its tracks and operate its cars without gift, purchase, or condemnation of land. That privilege creates no new servitude upon the highway, but makes possible an additional use of such highway, consistent with and in furtherance of the purposes of its original dedication. The railroad company may have an estate; the street car company always has a franchise. The lands over which a railroad company builds its road are withdrawn from general or private use; the surface of a street is open to common travel. The way of a railroad company is used by it exclusively, subject to limited rights at public or private crossings; a street is used concurrently by the street car company and by the public. *Kinsey v. Traction Co.*, (Ind. Sup.) 81 N. E. 922; *Ind. T. & T. R. R. Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347; *Atty.-Gen. v. Met. Ry. Co.*, 125 Mass. 515; *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, 12 Am. Neg. Cas. 59, 42 N. E. 334; *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3, 12 Am. Neg. Cas. 40, 35 N. E. 95; *Hall v. Ogden St. Ry. Co.*, 13 Utah, 258, 44 Pac. 1046, 12 Am. Neg. Cas. 627; *Newark Passenger Ry. Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 12 Am. Neg. Cas. 288; *Citizens' Coach Co. v. Camden*, 33 N. J. Eq. 267; *Lawler v. Ry. Co.*, 72 Conn. 74, 43 Atl. 54; *Clark v. Bennett*, 123 Cal. 275, 5 Am. Neg. Rep. 299, 55 Pac. 908; *Spiking v. Ry. Co.*, 33 Utah, 313, 93 Pac. 841; *Pilmer v. B. T. Co.*, 14 Idaho, 327, 94 Pac. 432; *United Rys. v. Watkins, Ex'r*, 102 Md. 264, 62 Atl. 234. Every traveler has an equal right on public streets to every part thereof with any other traveler, including street railways. The railway company can obtain a superior right only by condemnation. It has no priority of way. *Id.* And see *Laufer v. B. T. Co.*, 68 Conn. 475, 2 Am. Neg. Rep. 310, 37 Atl. 379. Even in New York (see *post*) it has been held that as to persons who have occasion to cross the highway the rights of the street car are precisely the same in kind as the right of other persons or vehicles. *Dunican v. Union R. Co.*, 39 App. Div. (N. Y.) 479-500, 6 Am. Neg. Rep. 155, 57 N. Y. Supp. 326; *Sesselman v. R. R. Co.*, 65 App. Div. 484, 72 N. Y. Supp. 1010; *O'Neill v. Dry Dock, E. R. & B. R. Co.*, 129 N. Y. 125, 29 N. E. 84. This is certainly the rule in this State. *Shea v. St. Paul City Ry. Co.*, 50 Minn. 399, 12 Am. Neg. Cas. 155, 170, 52 N. W. 902; *Holmgren v. T. C. R. T. Co.*, 61 Minn. 87, 63 N. W. 270; *Watson v. Minn. St. Ry. Co.*, 53 Minn. 551, 12 Am. Neg. Cas. 146, 55 N. W. 742; *Kennedy v. St. Paul City Ry. Co.*, 59 Minn. 45, 12 Am. Neg. Cas. 154, 60 N. W. 810; *Smith v. R. T. Co.*, 95 Minn. 254, 104 N. W. 16.

The mutual rights of travelers and street cars to use public streets imposes the duty on both to exercise mutual care. The rights and duties of both are reciprocal. *Shea v. St. Paul City Ry. Co.*, 50 Minn. 399, 12 Am. Neg. Cas. 155, 170, 52 N. W. 902; *Pilmer v. B. T. Co.*, 14 Idaho 327, 94 Pac. 432. Both are required to exercise care. Neither is bound to anticipate negligence on the part of the other. On the one hand, the motorman ordinarily is justified in assuming that a person using the highway will exercise ordinary care for his own protection (8 Cur. Law, 2023, note 32), and that no one will attempt to cross the tracks so close in front of a moving car as to render a collision probable. See, for example, *Baly v. St. Paul City Ry. Co.*, 90 Minn. 39, 42, 16 Am. Neg. Rep. 205, 95 N. W. 757; *Bresee v. L. A. T. Co.*, 149 Cal. 131, 85 Pac. 152. The general rule is none the less certain that at a street crossing, or at a place used as a street crossing, the motorman in charge of a car approaching one discharging passengers is bound to keep a sharp lookout for passengers or other persons who may attempt to cross the tracks behind that standing or moving car, to have his car under such control that he can stop it upon the appearance of danger, and to give such signals as will usually protect travelers who are in the exercise of ordinary prudence. *Louisville City Ry. Co. v. Hudgins*, 124 Ky. 79, 98 S. W. 275. And see *C. C. Ry. Co. v. Robinson*, 127 Ill. 9, 18 N. E. 722; *Cin. St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183; *Birmingham Co. v. City Co.*, 119 Ala. 615, 24 So. Rep. 558. The more specific rule, as was said in *Traction Co. v. Lusby*, 12 App. Cas. (D. C.) 295, 301, is that, "when a train has stopped to let off or take on passengers, a train on the reverse course should never be allowed to pass the stopping train, except it be on such caution and noticeable signals as are reasonably calculated to avoid the possibility of injury to passengers. Every passenger is entitled to full protection against injury as far as human agency employed in the management of the cars can afford it, and especially is this care required while the passenger is getting on or making exit from the train. The passenger is entitled to this protective care of the railroad company until he or she is entirely free of danger from the movement of the cars on the tracks either way, assuming, of course, that the passenger is using reasonable care for his or her own safety and protection. However desirable rapid transit may be, it can only be lawfully accomplished in subordination to the strict observance of proper and safe rules and regulations for the security of life and limb of the public." The rule in this State accords. In *Watson v. Minn. St. Ry. Co.*, 53 Minn. 551, 12 Am. Neg. Cas. 146, 55 N. W.

742, Gilfillan, C. J., said: "At street car crossings as high a degree of care is required of those in charge of electric cars as of other persons using the highways." And see *Gray v. St. Paul City Ry. Co.*, 88 Minn. 280, 12 Am. Neg. Rep. 604, 91 N. W. 1106; *Peterson v. Minn. St. Ry. Co.*, 90 Minn. 55, 16 Am. Neg. Rep. 203, 95 N. W. 751.

On the other hand, a traveler on a street has a right to rely on the exercise of prudence conforming to the standard of law by the motorman, and is not bound to anticipate negligence on his part. *O'Brien v. Ry. Co.*, 98 Minn. 205, 108 N. W. 805. Thus, where he has alighted from a car, and is passing behind it, and undertakes to cross another track, "he no doubt has a right to expect that any car which might be upon the other track would not run at a dangerous rate of speed and would be lawfully managed" (*Creamer v. West End St. Ry. Co.*, 156 Mass. 324, 31 N. E. 391, 9 Am. Neg. Cas. 448), and that it would be under such control as would enable it to protect the rights of others, and that it would give the usual warning of its approach (*Scott v. Traction Co.*, 152 Cal. 604, 93 Pac. 679; *Spiking v. Consol. Ry. Co.*, 33 Utah, 313, 93 Pac. 841; *Binns v. Brooklyn H. Ry. Co.*, 89 App. Div. 359, 361, 16 Am. Neg. Rep. 210, 85 N. Y. Supp. 874; *Evansville St. R. Co. v. Gentry*, 147 Ind. 409, 44 N. E. 311; *Smith v. Ry. Co.*, 95 Minn. 257, 104 N. W. 16; *White v. Ry. Co.*, (Del. Super.) 63 Atl. 931). "There is no priority of right, so that the right of neither is exclusive. * * * Life and limb are of more consequence than quick transit. * * * The opposite doctrine seems to have found lodgment in many minds, and there seems to be a disposal to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of life and limb, and pedestrians are compelled at their peril to keep out of the way. As a matter of law it is as much a duty of vehicles to keep out of the way of footmen, and especially at crossings, as it is for the latter to escape being run over, giving due consideration to the great difficulty of guiding and arresting the progress of a vehicle." *Spear, J.*, in *Cin. St. Ry. Co. v. Snell*, 54 Ohio St. 197, 12 Am. Neg. Cas. 477, 43 N. E. 207, 209.

The traveler himself, however, owes the duty to exercise due care in protecting himself and in avoiding harm. Exactly what constitutes such care is the subject of some difference in opinion. In some jurisdictions that care is held to be practically the same as the caution required of travelers about to cross the tracks of an ordinary freight and passenger railroad upon a rural highway; that is, he must

at his peril "stop, look and listen." For example, see *Hoelzel v. Crescent City Ry. Co.*, 49 La. Ann. 1302, 3 Am. Neg. Rep. 409, 22 South. 330; *Hornstein v. U. Ry. Co.*, 195 Mo. 440, 92 S. W. 884, collecting cases at 887. This rule is the rule in Pennsylvania. *Berger v. P. T. Co.*, (C. C.) 141 Fed. 1020. That this position is not tenable clearly appears from what has been previously said as to the primary distinction between the mutual rights and duties recognized by law as existing between users of the highway and of a street car company. Moreover, not only are the incident perils different, but, while to stop at a country crossing is not only prudent, but safe, to stop on the streets of a city is often as dangerous as to proceed. The pedestrian's duty is to be considered in connection with his justified presumption that the street car company, having no priority of way, will be careful especially at a crossing. Accordingly, the general rule is that the same care or watchfulness is not required in crossing a street car track as in crossing a railway track. *Lyman v. Union Ry. Co.*, 114 Mass. 88, 12 Am. Neg. Cas. 58, per Gray, J.; *Robbins v. Springfield St. Ry. Co.*, 165 Mass. 30, 12 Am. Neg. Cas. 59, 42 N. E. 334; *Hall v. West End St. Ry. Co.*, 168 Mass. 461, 3 Am. Neg. Rep. 38, 47 N. E. 124; *White v. Consol. St. Ry. Co.*, 167 Mass. 43, 12 Am. Neg. Cas. 56, 44 N. E. 1052; *Marden v. Ry. Co.*, 100 Me. 41, 60 Atl. 530 (a leading case); *Newark Pass. Ry. Co. v. Block*, 55 N. J. Law, 614, 12 Am. Neg. Cas. 288, 27 Atl. 1067; *Consol. Tr. Co. v. Scott*, 58 N. J. Law 682, 12 Am. Neg. Cas. 283, 34 Atl. 1094; *Richmond Ry. Co. v. Carthright*, 92 Va. 627, 24 S. E. 267; *Rich. & P. Co. v. Gordon*, 102 Va. 498, 46 S. E. 772; *Chauvin v. Detroit Union R. Co.*, 135 Mich. 85, 15 Am. Neg. Rep. 628, 97 N. W. 160; *Pilmer v. Traction Co.*, 14 Idaho, 327, 94 Pac. 432; *Spiking v. Ry. Co.*, 33 Utah, 313, 93 Pac. 838; *Pergue v. Ry. Co.*, 131 Iowa, 710, 109 N. W. 280; *Kramm v. Ry. Co.*, 3 Cal. App. 606, 86 Pac. 738, 903; *Niemeyer v. Ry. Co.*, 45 Wash. 170, 88 Pac. 103; *Saylor v. U. T. Co.*, 40 Ind. App. 381, 81 N. E. 94.

More specifically "persons crossing street railway tracks in the city are not obliged to stop, as well as look and listen, before crossing such tracks, unless some circumstances may make that ordinary prudence." Taft, J., in *Cin. St. Ry. Co. v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183; *Evansville St. Ry. Co. v. Gentry*, 147 Ind. 408, 44 N. E. 311. Failure to look and listen may constitute contributory negligence as a matter of law. *Hooks v. Ry. Co.*, 147 Ala. 700, 41 So. Rep. 273; *Blackwell v. Ry. Co.*, 193 Mass. 222, 79 N. E. 335; *Price v. Ry. Co.*, (R. I.) 66 Atl. 200; *Phillips v. Ry. Co.*, 104 Md. 455, 65 Atl. 422. The rule as to the requirement of looking and

listening is not a "hard and fast one" (*Mitchell, J., in Holmgren v. Ry. Co.*, 61 Minn. 87, 63 N. W. 270; *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, 12 Am. Neg. Cas. 155, 170, 52 N. W. 902); nor does "it apply with the same force" as at a railroad crossing (*Lovely, J., in Metz v. St. Paul City R. Co.*, 88 Minn. 48, 16 Am. Neg. Rep. 203, 92 N. W. 502. And see *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, 12 Am. Neg. Cas. 155, 170, 52 N. W. 902; *Smith v. Ry. Co.*, 95 Minn. 259, 104 N. W. 16, and cases there collected), nor "in its strict sense" (*Traction Co. v. Lusby*, 12 App. Cas. (D. C.) 295). And it has been held that mere "failure to look and listen does not *per se* constitute negligence." *Spear, J., in Marden v. Ry. Co.*, 100 Me. 41, 60 Atl. 530. In *Pilmer v. Traction Co.*, 14 Idaho 327, 94 Pac. 432, 435, *Sullivan, J.*, quoted from *Richmond, J., in Richmond, etc., Co. v. Gordon*, 102 Va. 498, 46 S. E. 772, and approves the following instructions as a correct statement of the law: "While, generally speaking, one who is about to cross a street railway should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of ordinary steam railroads. It is not negligence as a matter of law to omit to do so. The question is whether men of ordinary prudence, exercising ordinary care and prudence, would have thought it necessary to do so." And see *Evansville St. Ry. Co. v. Gentry*, 147 Ind. 409, 411, 412, 44 N. E. 311. Indeed, mere failure to look, it has been held, does not necessarily prevent recovery. *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 4, 12 Am. Neg. Cas. 40, 35 N. E. 95. In the nature of things, when failure to look and listen constitutes negligence must depend on the peculiar circumstances of each case. As *Brown, J.*, said in *Russell v. Minn. St. Ry. Co.*, 83 Minn. 307, 10 Am. Neg. Rep. 337, 86 N. W. 347: "Failure to look and listen might be conclusive, or at least very strong evidence of negligence in one case, and in another of no controlling force at all. The ultimate determination of the question must depend largely in each case on the circumstances." And see *Start, C. J., in Curran v. Ry. Co.*, 100 Minn. 58, 110 N. W. 259, and *O'Brien v. St. Paul City Ry. Co.*, 98 Minn. 206, 20 Am. Neg. Rep. 586, 108 N. W. 805. In this State there is no presumption that the traveler was guilty of contributory negligence. The burden is on the defendant to prove it. *Holmgren v. T. C. R. T. Co.*, 61 Minn. 87, 63 N. W. 270; *cf. Evansville St. Ry. Co. v. Gentry*, 147 Ind. 409, 44 N. E. 311; *cf. New York rule, post*. Whether defendant has borne the burden is ordinarily a question for the jury. *Terien v. Ry. Co.*, 70 Minn. 532, 73 N. W. 412; *Scott v. Traction Co.*, 152 Cal. 604, 93 Pac. 679; *Clark v. Bennett*, 123 Cal. 277, 55 Pac. 908, 5 Am. Neg. Rep. 299.

The authorities which involve circumstances similar to those in the instant case accord with and require the confirmation of the order of the trial court refusing to hold that plaintiff was as a matter of law guilty of contributory negligence. It will conduce to convenience in this case, first, to distinguish allied but different cases, and second, to consider the most nearly specific cases.

First. The only decisions which are properly in the same group with the case at bar are those in which the traveler has approached the place of danger to a point where his view is obstructed, and where circumstances imposed on the car company the duty of anticipating the presence of passengers and of controlling the car and giving warning accordingly. For, while passengers have a right to cross in front of a standing car (*Kennedy v. St. Paul City Ry. Co.*, 59 Minn. 49, 12 Am. Neg. Cas. 154, 60 N. W. 810), and while one is not guilty of contributory negligence in walking on a street car track laid in a public highway in the exercise of due care and caution (*Goff v. Traction Co.*, 199 Mo. 694, 98 S. W. 49, and note; *Ind., etc., Co. v. Kidd*, 167 Ind. 402, 79 N. E. 347), the user of the highway knows that the motorman has a right to rely upon his observation of the dictates of prudence, and is not bound to anticipate an attempt to cross in front of the car. Cases in which a pedestrian, starting from the curb or like place where the approach of the car or cars can be seen, has walked in front of the car and has been held guilty of contributory negligence, are not in point. *Terien v. Ry. Co.*, 70 Minn. 532, 73 N. W. 412; *Metz v. St. Paul City Ry. Co.*, 88 Minn. 48, 16 Am. Neg. Rep. 203, 92 N. W. 502; *O'Brien v. St. Paul City Ry. Co.*, 98 Minn. 205, 20 Am. Neg. Rep. 586, 108 N. W. 805; *Pittsburg Ry. Co. v. Cluff*, 149 Fed. 732, 79 C. C. A. 438.

Ames v. Waterloo & C. F. R. T. Co., 120 Iowa, 645, 95 N. W. 161, 16 Am. Neg. Rep. 202, to which defendant refers us, is not apt. Plaintiff there stepped from behind, not a street car, which had stopped to allow passengers to alight, but from behind a covered wagon under circumstances in which the court expressly pointed out he was "in no wise distracted or interfered with by surrounding circumstances or conditions either in seeing the car or avoiding it." And see *Halner v. Traction Co.*, 197 Mo. 196, 94 S. W. 291; *Hageman v. Ry. Co.*, 74 N. J. Law, 279, 65 Atl. 834. So, in the case of a person attempting to cross a street at a point where his view was obstructed, not by a car which had stopped for passengers, but by a car which was passing in ordinary transit, the situation was correspondingly different from that in the instant case. See *Thompson v. B. R. Co.*, 145 N. Y. 196, 39 N. E. 709, in which a child of four-

teen, attempting to cross a street in the middle of a block, ran behind a passing car without looking to see if a car was approaching on another track, and was held negligent as a matter of law. *Cf. Downs v. Ry. Co.*, 75 Minn. 41, 77 N. W. 408.

Of the authorities which are properly in the class to which the instant case belongs, none to which our attention has been called, or which our somewhat extended search has revealed, require or justify holding the plaintiff guilty of contributory negligence as a matter of law. Some of them are differentiated by the presence of features wholly wanting here and by the absence of the distinctive facts appearing in this record. Thus in *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, 324, 9 Am. Neg. Cas. 448, 31 N. E. 391, the approaching car was open, well lighted, and filled with a crowd of shouting and singing passengers, and warning was shouted to plaintiff, who had alighted from the departing car. Other cases, also, as *Morice v. Ry. Co.*, 129 Wis. 529, 109 N. W. 567, involving the presence of a headlight in operation, are not in point; for this accident happened in the daytime. In many of such authorities the distinction rests on differences, not only in circumstances, but also in the rules of law in the jurisdictions in which they were rendered. Defendant has referred us to a number of New York cases. As will presently be pointed out, even in that State, under the present circumstances, this case would have gone to the jury; but it is to be borne in mind that under some later decisions of the courts of that State the law is that "street railway cars between crossings have a preference." The pedestrian must stop, look, and listen, satisfy himself that the way is clear, and exercise essentially the same care with respect to a street car track as with respect to a railroad track. See *Thompson v. Ry. Co.*, 145 N. Y. 196, 39 N. E. 709, in which many cases are referred to; *Doyle v. N. Y. City Ry. Co.*, (Sup.) 39 N. Y. Supp. 440; *McGreevy v. N. Y. Ry. Co.*, (Sup.) 98 N. Y. Supp. 1024, in which it is to be noted that Houghton, J., did not think that the alighting passenger was guilty of contributory negligence as a matter of law. This case was decided after *Reed v. St. Ry. Co.*, 180 N. Y. 315, 73 N. E. 41. In *Axelrod v. Ry. Co.*, (Sup.) 95 N. Y. Supp. 1072, under circumstances similar in general to those at bar, but without its distinctive features, the deceased was held guilty of contributory negligence; but it was also held "that plaintiff has the burden of proving freedom of contributory negligence." However, for example, in *Moebus v. Herrmann*, 108 N. Y. 354, 15 N. E. 415, 12 Am. Neg. Cas. 306, involving similar facts to those at bar, except that injury was inflicted by an ordinary carriage, the court said the duty

imposed upon the wayfarer in crossing the street between the tracks of a railroad to look both ways does not as a matter of law attach to such persons when about to cross from one side of the street to the other in a city street. The degree of caution which he must exercise would be affected by the situation and the surrounding circumstances. And there are many other New York cases inconsistent with these defendant has selected. [See *ante*.] The difference both in law and in circumstances appears also in *Gray v. Traction Co.*, 198 Pa. St. 184, 47 Atl. 945, to which defendant refers us. There, after alighting, the plaintiff started towards the other track without stopping or looking, or listening, and was immediately struck by a car on that track. He was warned of his danger by the motorman of the car following the car from which he had alighted, and could have saved himself if he had heeded the warning. The court said: "When Mr. Gray alighted from the car in the street, he was in a place of safety, and it was his duty to remain there, or to go to the sidewalk and wait until the car was clear, or until he could see that it was clear." It has previously been shown that the relevant principles of law generally recognized and in force in this State are at right angles with the bases of the decisions. See *Ind. St. Ry. Co. v. Tenner*, 32 Ind. App. 311, 67 N. E. 1045, 14 Am. Neg. Rep. 329. But see elaborate dissenting opinion by Roby, J., 32 Ind. App. 318, 67 N. E. 1047, and *Hornstein v. U. Ry. Co.*, 195 Mo. 440, 92 S. W. 884, in which the alighting passenger was held guilty of contributory negligence because "the plaintiff did not stop for a moment, that he might have unobstructed view of the track and see whether or not it was safe to proceed across the street."

Second. Even of the most nearly specific cases, none involve identical facts. Some of them have, however, determined that certain features of this case alone were sufficient to require the submission of the question of contributory negligence to the jury. Thus contradictory testimony as to the way usual signals or warnings were given has been held sufficient to raise the issue of fact. *Dobert v. T. C. Ry. (Sup.)* 36 N. Y. Supp. 105 (as to a plaintiff who had alighted from another car); *Chicago City Ry. Co. v. Loomis*, 201 Ill. 118, 16 Am. Neg. Rep. 202, 66 N. E. 348 (as to passenger at crossing). In *Stevens v. Ry. Co.*, 75 App. Div. (N. Y.) 603, 78 N. Y. Supp. 624, affirmed 176 N. Y. 607, 68 N. E. 1125, the motorman failed to slacken speed and to give warning as he approached and passed a car on another track going in an opposite direction. The car struck the passenger, who had alighted from another car, and carried him forty or forty-five feet beyond the place of collision.

This was sufficient to make the question of negligence and contributory negligence for the jury. And see *Binns v. Brooklyn H. Ry. Co.*, 89 App. Div. 359, 16 Am. Neg. Rep. 210, 85 N. Y. Supp. 874. In the instant case the passenger was carried 100 feet. In *Pelletrian v. Met. St. Ry. Co.*, 74 App. Div. 192, 77 N. Y. Supp. 386, affirmed 174 N. Y. 503, 66 N. E. 1113, a passenger who had alighted and passed behind a north-bound car, and who was approaching a southerly track, was injured by a passing car. A companion had preceded plaintiff and crossed successfully. The court said: "The space between the north-bound car and the west track was slight, and plaintiff's vision in the northerly direction was obscured by the car behind which she passed, and, as she heard no gong sounded or other warning of an approaching car, we cannot say that she was guilty of contributory negligence because she may have erred in thinking she could follow her companion in safety." The most nearly analogous case in this jurisdiction is *Peterson v. Minn. St. Ry. Co.*, 90 Minn. 52, 16 Am. Neg. Rep. 203, 95 N. W. 751. There the attention of the alighting passenger, seventy years of age, was distracted by the circumstance that another car was approaching on the same track and a boy on a bicycle was racing with it. Here contributory negligence was held to be for the jury. The principles there applied would determine this case as did the trial court.

Defendant refers us to *Downs v. City Ry.*, 75 Minn. 41, 77 N. W. 408, where a boy familiar with the situation passed in front of a car barn and was injured by a car issuing from it. The court said: Plaintiff "was bound to exercise ordinary care. It may be considered that he was not as a matter of law bound to stop and look through the doorway before crossing the tracks; but it was negligence for him to heedlessly trot along at the front of the opening and only two feet therefrom, without doing anything to ascertain whether a car was coming out, knowing that one might come out at any moment." The rule deducible from the cases most nearly in point is that: Where the evidence of the plaintiff shows actionable negligence on the part of the company, and the question of contributory negligence of the plaintiff depends upon a variety of circumstances, from which different minds may reasonably arrive at different conclusions as to whether there was contributory negligence or not, the question should be submitted to the jury under proper instructions; and it is error in such case for the court to direct a verdict for the defendant.

In the light of these general principles and of these special authorities, the conclusion of the learned trial judge that plaintiff

was not guilty of contributory negligence as a matter of law must be confirmed. It will be assumed that her rights and duties were determined by the rule laid down in *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, 322, 31 N. E. 391, 9 Am. Neg. Cas. 448, as follows: "One who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger." But plaintiff was not a trespasser, nor was she undertaking to cross a railway track. The rights of plaintiff and defendant to use the street were mutual, and their duties to take care reciprocal. The place at which she was injured was in the settled portion of the city, where there was considerable travel, and was governed by rules applicable to urban traffic. It was not at the intersection of streets, but had been and in this case was recognized by defendant essentially as a stopping place for passengers and as a crossing. When plaintiff alighted and passed behind the car she had left, she was bound to exercise commensurate care in the highest sense to avoid injury. Her view was obstructed by the projecting back of a retreating car. She was not as a matter of law negligent under the circumstances of this case because she did not stop to step back or return to the sidewalk until the retreating car had gone far enough to enable her to see whether a car was approaching on the other track. She had the right to rely on the exercise of due care on the part of the motorman of such car in giving usual signals, in having his car under reasonable control, and in going at a slow speed. She was not required to reason that he might be negligent and to govern herself accordingly. She heard no bell. She saw another passenger who had left the car in which she had come pass behind it as she was doing. As she followed him, she saw him cross the southerly track. This the jury might have found was a natural assurance of safety.

The significance of the gesture of her fellow passenger, exactly what it was, when it was given, where she was at the time, whether she saw it or should have seen it, what effect it should have had under the circumstances, and what she could have done if it had been a caution, were regarded by the trial court questions for the jury. *A fortiori* that view must be taken here. The trial judge saw the gesture. It is merely indicated on the record before us. There was other testimony, besides that of the man ahead, favorable to plaintiff's contention. The jury might reasonably have found that, acting on the reassurance of his conduct, plaintiff had prudently

undertaken to cross, and moving slowly — she was sixty-five years of age — and with due caution had acquired such an impetus which carried her beyond the very slight distance — eighteen inches — between the cars as made it impossible for her to retreat before the car coming at a dangerous rate of speed struck her. The fact that it carried her 100 feet was, as was pointed out in the New York case, persuasive not only of the presence of defendant's negligence, but also of the absence of contributory negligence on her part.

It follows that the order of the trial court in refusing to grant defendant's motion must be affirmed.

Affirmed.

BOESON V. OMAHA STREET RAILWAY COMPANY (1).

Supreme Court, Nebraska, February, 1909.

- 1. PASSENGER INJURED BY DERAILMENT OF STREET CAR — INSTRUCTIONS — EVIDENCE.** — In this, an action for personal injuries alleged to have been occasioned by the derailment of a street car, whereby the plaintiff was thrown from the car and thereby injured, the defendant pleaded contributory negligence, in that the plaintiff was negligently standing upon the running board of the car at the time of the accident, and his injuries resulted from such negligence. *Held*, that it was not error to refuse an instruction that if the jury believed from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car when it was in motion and fell into the street, their verdict should be for the defendant, since such an instruction is neither within the issues made by the pleadings nor the evidence in the case (2).

1. See former decision, *Omaha St. Ry. Co. v. Boesen*, (October, 1905) 19 Am. Neg. Rep. 358, 105 N. W. 303, 74 Neb. 769, where judgment for plaintiff in the District Court was reversed for error in the trial judge's charge with respect to the degree of proof necessary to rebut the presumption of negligence arising from the derailment of the car and consequent injury to the plaintiff, the rule being that "in such a case a presumption of negligence arises from the fact of de-

railment, but when that presumption is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict."

2. *Derailement of street cars and trains.* — For actions arising out of injuries to passengers caused by derailment of street cars or trains, from earliest period to 1896, see Vols.

2. INSTRUCTIONS — CONSTRUCTION. — Instructions should be considered together. Separate clauses or parts of a sentence should not be separated from the context in order to arrive at the true meaning of the language, but all that is said upon the particular subject is to be taken.
3. HARMLESS ERROR — ADMISSION. — A witness testified that the plaintiff "was thrown from the car," but he testified later that he did not see the plaintiff until he was lying on the ground. A motion to strike his answer as being merely a conclusion of the witness was overruled, and exception taken. *Held*, that, while the answer should have been stricken, the error was not prejudicial, since the jury could not have been misled by the testimony.

FAWCETT and BARNES, JJ., *dissent in part*.
(*Syllabus by the Court.*)

APPEAL by defendant from judgment for plaintiff in the District Court, Douglas County, in action by John Boesen against the Omaha Street Railway Company. *Judgment affirmed.*

JOHN L. WEBSTER and W. J. CONNELL, for appellant.

T. W. BLACKBURN and R. S. HORTON, for appellee.

LETTON, J. — This is the fourth appearance of this case in this court. See 68 Neb. 437, 94 N. W. 619; 74 Neb. 769, 105 N. W. 303, 19 Am. Neg. Rep. 358; 112 N. W. 614 (3). The facts are fully set forth in the former opinion. On account of the nature of some of the errors assigned, it becomes necessary to notice particularly the issues as now presented by the pleadings. The petition in substance

9 and 10 AM. NEG. CAS., where the same are chronologically grouped and arranged in alphabetical order of States. Subsequent cases to date are reported in Vols. 1-21 AM. NEG. REP.

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition), titles CARRIER of PASSENGERS and DERAILMENT, where the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) relating not only to passengers but also to employees and others injured in derailment of street cars and trains, are collated.

3 The Supreme Court of Nebraska in June, 1907, reversed the judgment for the defendant in the District Court for the giving of instructions prejudicial to plaintiff. See *Boesen v. Omaha St. Ry. Co.*,

(Neb., 1907) 112 N. W. 614, where the court (per DUFFIE, C.) in reversing the judgment said:

"A statement of the case will be found in the opinion of Mr. Commissioner Albert on the former appeal, and the facts need not be again repeated here. It is conceded that the accident took place at what is known as the 'blind switch,' just north of O street, in the city of South Omaha. The evidence is undisputed that the plaintiff was standing on the running board of the rear or trailer car, and his claim is that, on reaching the blind switch, the car was derailed, throwing him to the pavement, and causing the injuries for which he brings suit. The plaintiff testified that both the motor and trailer car

alleges that the defendant is a common carrier of passengers operating a street railway in the city of Omaha; that, while the plaintiff was a passenger, the car upon which he was riding, through the negligence of the defendant, suddenly left the track, and threw the plaintiff violently to the pavement, and that he was permanently injured by the accident. The answer denies that the car left the track and threw plaintiff to the pavement, avers that the car and track were in good order and condition, and were so long before the time of and after the accident. It also avers that the accident was caused from extraneous causes over which the defendant had no control. It also alleges that the plaintiff was guilty of contributory negligence in riding upon the running board of the car, denies that the plaintiff has been injured permanently or to any extent, and further contains a general denial. The reply denies the new matter in the answer. The case was tried to a jury, and a judgment rendered for the plaintiff, from which defendant appeals.

1. The first complaint made is that the court should have given an instruction requested by the defendant, to the effect that if the jury believed from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car when it was in motion, and fell into the street, their verdict should be for the defendant, and it is argued in support of this assignment that the theory and contention of the railway company on this trial are the same as they were at the time this case was before the court for the

were crowded at the time he boarded the trailer; that the conductor in charge of the car directed him to stand upon the running board. This evidence is undisputed, and plaintiff is corroborated by other witnesses that he stood upon the running board because both the motor and trailing car were crowded with passengers. It was claimed by the defendant that plaintiff was guilty of contributory negligence in riding upon the running board of the car, and this was brought to the attention of the jury by the third instruction of the court, who further said to them: 'If you find from the evidence in this case that in so riding he was guilty of negligence which contributed to his injury, then the

plaintiff would not be entitled to recover, and your verdict should be for the defendant.' The plaintiff requested the following instruction upon that phase of the case: 'You are instructed that, if the plaintiff was standing on the running board of the car at the invitation of the defendant, his standing on said running board would not of itself constitute negligence on his part.' We have no doubt that the plaintiff was prejudiced by the instruction given by the court, and by its refusal to give the instruction asked by the plaintiff. If a passenger, at the direction of those in charge, takes a designated place on the car of the company, he cannot be charged with negligence solely from the fact that he rode

first time. The defendant is in error upon this point. The issues, as will be observed, are the same as when the case was presented here the last time. After reading the evidence, we adopt and fully agree with the statement made in the opinion by Mr. Commissioner Duffie on that occasion, that "we have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion." There was no error in refusing this instruction.

2. The seventh instruction given by the court is said to be erroneous. By the fifth instruction the jury were instructed that a street railway is not an insurer of the personal safety of its passengers, nor is it bound to do everything which possibly might be done to insure their safety. It is bound to exercise the utmost skill, diligence, and foresight consistent with the practical conduct of its business, and a failure on its part to exercise such skill, diligence, and foresight would be negligence. By the seventh instruction the jury were told, in substance, that the defendant had alleged in its answer the good order and condition of its car and track, and that the accident occurred presumably from extraneous causes which could not be guarded against by the exercise of the greatest care, skill, and diligence of the defendant, and the jury were told that if they found "that the derailment of the car on which the plaintiff was riding (should you find that the same was derailed) was one of those

in such a position. He cannot be charged with contributory negligence because of the position which he occupies at the direction and request of the company. The negligence, if any, in standing where he is directed, is the negligence of the company.

"In *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230, 9 Am. Neg. Cas. 587, it is said: 'Assuming that deceased had a right to be safely carried by appellant to the stock-yards, he had a right to suppose that he would not be assigned to a place of extra hazard or peril, and that to whatever place assigned reasonable care would be exercised to protect him from injury.' In *City Ry. Co. v. Lee*, 50 N. J. Law, 435, 9 Am. Neg. Cas. 562, 14 Atl.

883, the court said: 'It certainly cannot be contributory negligence that he at the invitation of the defendant exposed himself to risk or danger created by the defendant, and which he did not know and of which no warning was given. The position of this outside platform undoubtedly was attended by some risks and exposure. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing, and, had the plaintiff received his injury from such causes, it may be that negligence contributing to his injury would be imputed to him.'

unforeseen accidents that could not have been guarded against or prevented by the exercise of the highest degree of care, diligence, and foresight on the part of the defendant, consistent with the practical conduct of its business, and that said defendant was not guilty of the slightest negligence which contributed to the said accident, then the defendant would not be liable to the plaintiff for injuries sustained by him, and your verdict should be for the defendant." The defendant calls special attention to the following clause in the seventh instruction: "And that said defendant was not guilty of the slightest negligence" — and contends that this language was highly prejudicial as imposing an undue burden upon the defendant, and that the extent of its duty is to exercise the highest degree of care, diligence, and foresight consistent with the practical conduct of its business and no more. Instructions should be considered together. Separate clauses or parts of a sentence should not be disconnected from the context if it is desired to obtain the true meaning of the language. Taking the two instructions referred to together, while the language of the latter may not be entirely proper, we think it impossible that the jury could have been misled with regard to the extent of the duty imposed by law upon the defendant with regard to the care of its passengers, and, when considered in connection with the evidence in this case, we cannot see how this language, even if objectionable in nature, in any wise prejudices the defendant.

"If the plaintiff in this case had been injured by a passing vehicle it is possible, although we have some doubt on the proposition, that he might be charged with contributory negligence, but he certainly cannot be so charged when he occupied the place by the direction of the conductor in charge of the car if the accident occurred from the operation of the train or from defects in the car or the tracks. The ninth instruction of the court is in the following language: 'You are instructed that, if you believe from the evidence that plaintiff attempted to get off the car while it was in motion and fell with his knee upon the pavement, he cannot recover in this action, and your verdict must be for

the defendant.' The plaintiff testified that he was thrown from the foot board by the car being derailed at the blind switch near O street. The witnesses, Oldman, Jodeit, and Mrs. Tobin, each testify that the trailer jumped the track at that point. We have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion. The instruction assumes that there was evidence to go to the jury, and submits to them a fact of which no evidence exists, and this, under the repeated holdings of this court, was error. The rule is so familiar that a citation of authorities is unnecessary."

3. The eighth instruction is also complained of. This instruction is quite lengthy. It states the defendant's plea of contributory negligence, in that at the time of the accident the plaintiff was standing upon the running board of the car. It defines contributory negligence, and instructs the jury that the burden of proof is upon the defendant to establish this defense. It further instructs them that, if he was standing upon the running board at the direction of the conductor of the car this "would not constitute negligence on his part; but the negligence, if any, in so standing where he was directed, would be the negligence of the defendant company." It is the quoted portion which is especially claimed to be erroneous. We fail to see wherein this instruction is prejudicial to the defendant. While the clause complained of, "but the negligence, if any, in so standing where he was directed, would be the negligence of the defendant company," we think adds nothing beneficial to the plaintiff or prejudicial to the defendant, this statement was made in the opinion of Mr. Commissioner Duffie in this case, and we cannot see but that it is a correct proposition of law. If the conductor in charge of the car directed the plaintiff to stand upon the running board and as a consequence thereof he was injured, we think it ordinarily would be the negligence of the company, since within reasonable limits the conductor has the right to designate upon what part of the car a passenger may ride, and, if it is a place which is known to be not necessarily dangerous and which is used by passengers as a matter of custom and usage well known to the company, the negligence, if any, is not that of the passenger, but of the carrier, since it ought to be better aware of the safety of any portion of its vehicles than an ordinary passenger.

4. The defendant complains of the refusal of certain instructions requested by it. We have examined these instructions and think that, in so far as they are material or proper, the substance of them had already been given, either by the court upon its own motion or in the instructions requested by the defendant and given.

5. Error is assigned with reference to certain rulings upon the admission of a portion of the testimony of the witness Jodeit. In the portion of the testimony objected to Jodeit stated, in substance, that he saw the plaintiff at Twenty-fourth and O streets; that "he was thrown off the car;" that Jodeit was in the car; that "the car went straight south on Twenty-fourth street, and the motor went over and the trailer took the Y and from the circumstances from what I know threw him out." The defendant objected to some of the questions which elicited this evidence, and also moved to strike

out the answer and conclusions of the witness for the reason that they were shown to be merely a conclusion, and argued that it clearly appeared from the record that the first time the witness saw Boesen was when he was lying in the street back of the car. The objections and motion were overruled. We are inclined to think the answer complained of should have been stricken out, but we fail to see wherein any error prejudicial to the defendant was committed. The witness stated that he did not see Boesen until he was lying on the street, and it must have been clearly apparent to any jurymen of ordinary intelligence that, when the witness said Boesen was thrown from the car, he was merely testifying to his idea as to how the accident happened. We must presume that the jurors were men of ordinary common sense, and it is also an entirely safe presumption that the learned and diligent counsel for the defendant did not fail to dissect this testimony and clearly eliminate from the minds of the jury any erroneous notions as to its effect. The general credibility of Jodeit is also strongly assailed, but this is a matter entirely for the jury, and whatever may be our own opinion as to its credibility, we have no right to interfere with their verdict upon that ground alone.

It is also contended that the verdict is not sustained by the evidence, but with this contention we cannot agree. It is true that a number of conductors and motormen testify that they had been over this track repeatedly on the day that the accident happened, and that the car and the track and switch were in proper condition. The conductor and motorman on the car upon which Boesen was riding also denied that the trailer left the track. It appears, however, that the witness Tobin, who was a passenger and who was called by the defendant, testified on cross-examination that the car stopped because it was off the track. It was also shown that the motorman, Lear, who was in charge of the car the morning that the accident occurred, and who at this trial denied that the trailer left the track at the switch, testified on cross-examination at the former trial as follows: "Q. Did you notice that switch that morning as you went over it? A. No, sir; not any more than I would any other morning. Q. Did you notice it any other time that day more than you did that morning? A. I looked to see if there was anything wrong with it." He then denied that the following question had been put to him, and denied the answer: "Q. Why? A. The trailer left the tracks there." But it was proved by the official stenographer who took the testimony of Mr. Lear at the first trial that he did, in fact, testify as above. In addition to this testimony given by the defendant's witnesses, the evidence to the same effect amply sustains the findings of

the jury with reference to the trailer leaving the track at the switch. In such cases it is to be expected that the evidence will be conflicting; otherwise, in all probability there would be no connection between the parties.

In the whole record we find no prejudicial error. The judgment of the district court is therefore affirmed.

FAWCETT, J. — I am unwilling to hold that the giving of instruction No. 7 was not reversible error.

BARNES, J. — I am unwilling to approve of instruction No. 7, but otherwise concur in the opinion of the majority of the court.

ANDERSON v. PENNSYLVANIA RAILROAD CO. (1)

Court of Errors and Appeals, New Jersey, November, 1908.

VESSEL COLLIDING WITH DRAWBRIDGE — SIGNALS — NEGLIGENCE — QUESTION FOR JURY. — Plaintiff's yacht, on approaching a drawbridge and desiring to pass through, received a warning signal, whereupon plaintiff lay to in a safe place until another signal was given, interpreted by those on the boat as a signal to come on. The bridge had begun to open, and continued to open, though slowly, until the collision, which finally occurred. The boat was under sail, but the sail not drawing, and she was going with the tide, though it was inferable from the testimony that steerage way might have been gained at any time by trimming sheet. At 150 or 200 yards, according to the testimony, another signal was given from the bridge, indicating the left span as the one to pass through. At about fifty feet from the bridge, the tender called out that they must go back, and could not get through. It was then too late to avoid collision. *Held*, on these and the other circumstances as testified to, that the existence of negligence on the part of the bridge tenders, and of contributory negligence of the navigator of the boat, were both questions for the jury, and that a nonsuit was error.

GUMMERE, CH. J., and REED, VOORHEES, MINTURN, VREDENBURGH, GRAY, and DILL, JJ., *dissenting*.

(*Syllabus by the court.*)

ERROR to Supreme Court.

ACTION by Artillias A. Anderson against the Pennsylvania Railroad Company. Plaintiff was nonsuited, and brings error. The

1. For actions arising out of similar accidents as in the case at bar, see **AMERICAN NEGLIGENCE DIGEST** (1909 edition), which covers the cases reported in Vols. 1-20 **AM. NEG. REP.** (1897-1907). Consult the titles **BRIDGE** and **COLLISIONS** (vessels in collision).

facts appear in the opinion. *Reversed, and a venire de novo awarded.*

SAMUEL W. SHINN and JOHN W. WESCOTT for plaintiff in error.

GASKILL & GASKILL, for defendant in error.

PARKER, J. — The plaintiff in error, who was plaintiff below, was the owner of a sailing yacht, and sued the defendant company for damages caused by collision of the said yacht with a swinging draw of the defendant's railroad bridge over Rancocas creek in the county of Burlington. At the trial in the Supreme Court circuit, motion was made to nonsuit the plaintiff on two grounds: First, because no negligence of defendant's servants in the management of the bridge had been shown; secondly, because of contributory negligence in the management of the boat. From the remarks of the court in disposing of the motion, we infer that the nonsuit which was entered was granted on the ground of contributory negligence. The case is here on writ of error to the judgment then entered; and, if a nonsuit was justified on either ground, it should stand.

Rancocas creek at the place in question, which is just at its mouth, is quite a wide stream, which might well be described as a river, running east and west. On the north or right bank is the village of Delanco; opposite, on the south bank, Riverside. These two places are connected by a county bridge, east of which, at a distance of about 400 yards or more, is the defendant's railroad bridge, running, as indicated by the official maps, nearly northeast and southwest, while the county bridge runs nearly north and south. By bearing these details in mind an apparent inconsistency in the testimony is fully explained, and the case will be more readily understood. The accident occurred on May 25, 1905, at about 6:45 P. M., it being still light. Shortly prior to that time plaintiff's boat, with plaintiff aboard, and having one Parker to navigate it, came up the Delaware river, and entered the mouth of Rancocas creek on the way to Hainesport, near Mt. Holly. There was a strong tide setting up the stream. The wind was light, and the boat, sailing free, passed through the draw of the wagon bridge. After going about one-third the distance to the other bridge, plaintiff and Parker, who was steering, saw the bridge tender on the railroad bridge wave a red flag for them, and a white flag for an approaching train which was just leaving the Riverside station. Parker accordingly headed for the power house at Riverside, and lay to in a position out of the tide, about 400 yards from the railroad bridge. They waited there, according to Parker's testimony, until "the train had gone on towards Delanco, and they had started to turn the draw." The bridge tender

waved his white flag, and shouted something which Parker and plaintiff could not make out because of the wind. Parker called out, "We are coming through." The draw continued to turn; and presently he got under way, turning first, as he says, towards the wagon bridge, then let the boat pay off toward the boathouses on the Delanco side until it reached mid stream. Then he seems to have headed for the bridge, and slacked off the sheet so that the sail should not draw, moving by the tide alone. It is not certain just what sail this was, as the testimony is vague as to the exact type of the boat. She is described, in Parker's testimony, as a "two-masted sloop, with a jib." Plaintiff says she was forty-two feet long and fourteen feet beam, so that she might have been a small schooner, or what is known as a "yawls," having a mainmast forward and a smaller one at the stern. But only one sail was hoisted, "the forward sail," or inferably the foresail.

When within 150 or 200 yards of the railroad bridge, still in a place of safety so far as the case shows, the bridge turning all the while, but slowly, the bridge tender, according to plaintiff's testimony, "waved his hand, and showed them which side of the draw to take," indicating the northerly or Delanco end, which was to their left, and was swinging away from them. Parker's testimony as to what followed is as follows: "Q. How near open was the draw, then? A. The bridge was open very nearly far enough for the boat to go through, but they seemed to take so many turns around to make it open at all; seemed to open slowly. And when I got within fifty feet of the slip he hallooed for me. He says, 'You can't get through; you will have to turn.' Well, I couldn't. The tide was against me, the wind was against me, and I was simply there, and I held her just as close as I could to make her go through, thinking perhaps she might, but the stay ropes from the mast caught in the sleepers on the end of the draw as it was opening, and there was just about that much space (indicating). If it had been about that much further (indicating), it would have gone through. Of course that pulled the mast over, bent the mast clean over, and broke the top of it off, and of course opened her seams. Q. Then you were helpless, I suppose? A. Yes, sir. As soon as I seen I couldn't do no better, I dropped the sail and took away everything, and tried to stop it, but it was utterly impossible. Q. And the draw lacked about how much of being opened wide enough to let you through? A. If it had been opened two feet wider I could have gone through. Q. How many were working on the bridge when they were trying to turn it, did you see? A. I don't just recollect; three or four." The colloquy be-

tween the court and plaintiff's counsel on the motion to nonsuit indicates the view of the trial judge as to the inferences to be drawn from the signals: "The court: The signal to the plaintiff in this case has been testified to have been 400 yards away. At that time the draw of the bridge was not open. Mr. Wescott: Was being opened. It was testified to. The court: Well, they had started to turn it, according to the testimony. But it was obviously and palpably before the eyes of the plaintiff that the passageway was not then clear. He started the boat, and undertook to go into what seems to be to the court an obvious danger which he himself ought to have seen. In addition I don't see that there can be any inference drawn from the defendant's invitation to come through the draw that the draw was then in a safe condition to pass, as the plaintiff's own eyes indicated that he clearly observed that it was not. A nonsuit will be entered." The court seems to have overlooked the testimony of Anderson as to the proper channel being pointed out when they were 150 yards away; and to have taken the view that plaintiff was guilty of negligence in law by getting under way at all before the draw was sufficiently open to allow his boat to pass through, though plaintiff was entitled to infer that he was invited to come on. We think the nonsuit was erroneous; that a case for the jury was presented, both on the question of the negligence of the servants of the railroad company; and the contributory negligence, if any, of the plaintiff or his servant Parker. The general rules in regard to the duties and liabilities of those in charge of drawbridges over navigable streams, and those passing through them, are stated in 29 Cyc. 316-318, with the authorities, which may advantageously be examined in some detail.

In *St. Louis, etc., Packet Co. v. Keokuk Bridge Co.*, (C. C.) 31 Fed. 755, the rule was laid down that a pilot navigating a stream over which a drawbridge is erected is only obliged to use ordinary care and skill in passing through the draw, and the question, under all the circumstances, whether he did so is for the jury. In *Clement v. Metropolitan West Side El. Ry. Co.*, a case in the Circuit Court of Appeals, reported in 123 Fed. 271, 59 C. C. A. 289, a steamer 254 feet long was navigating the Chicago river at night, and passed safely through a number of bridges, but on reaching the next bridge, 135 feet away, at a speed dead slow, it was seen that the bridge was not opening, so full speed astern was ordered, but without avail. It was held that the vessel was not in fault, and that the burden was on the defendant, owner of the bridge, to explain the failure to open it. In *Central R. R. of N. J. v. Penna. R. R. Co.*, 59 Fed. 192, 8

C. C. A. 86, a tug with a tow in Newark bay whistled for the draw of the Central Railroad bridge to open, receiving no reply, though the whistle was repeated several times. The tug and tow slowed up as much as possible to avoid collision, and the draw was held closed some minutes until a freight train was allowed to pass over. The draw then opened, but too late to prevent collision of the tow with a pier of the bridge. The owner of the bridge was held liable on the ground that it owed the duty of reasonable care, not only not to impede safe navigation, but to avoid unnecessary delay. The case of *Manistee Lumber Co. v. Chicago*, (D. C.) 44 Fed. 87, presented a situation very similar to that in the case at bar. A schooner in tow of a tug was traversing the Chicago river. Whistle was blown to open a draw, and a bell was rung from the bridge to signify that it would be opened. This signal was intended to warn passengers on the bridge, but the court held that plaintiff's servants were entitled to regard it as an intimation, for their benefit. The draw tender found the locking mechanism out of order, and instead of signaling the tug at once to stop, began an investigation of the trouble, and found out too late that he could not get the bridge open. The court expressly held that the tug was not in fault for not slackening speed as soon it discovered that the draw was not swinging, and the city was therefore solely liable for the resulting collision. *Boland v. Bridge Co.*, (D. C.) 94 Fed. 888, presents a case of a steamer descending the Missouri river, sustaining other damage by trying to avoid collision with a drawbridge which was not opened. Navigation was evidently intermittent at the time, as the steamer people had sent word to the bridge tender the night before to be ready for them. They had the draw in sight for two miles, and saw men on it, who, as it happened, were not the ones to open it. The steamer advanced on the bridge until it was evident that the draw was not going to open, and then tried too late to make shore, and ran into some obstruction and was damaged. In a suit against the bridge company the defense of contributory negligence was raised, and the court held that it was a reasonable supposition that the men in charge would commence to open the bridge in time, and that no negligence was chargeable to the navigators of the boat. In *City of Chicago v. Mullen*, 116 Fed. 292, 54 C. C. A. 94, it was held to be negligence, on the part of the bridge tender, to swing the draw too far as a schooner in tow passed through, and that the latter was not bound to wait until the bridge was locked. The case of *Edgerton v. Mayor* (D. C.) 27 Fed. 230, arose out of a collision in the Harlem river. Though it was held to be negligence in the pilot of a tug to approach

the draw span at an angle, this course resulting in the collision, still it was held contributory negligence in the bridge tender not to favor the passage of the tug by revolving the draw beyond the middle line, as was customary, and under the admiralty rule the damages were divided. The general rule of conduct in such cases is very fully, and we think, accurately, stated by Jenkins, Circuit Judge, in *Clement v. Metropolitan West Side Ry. Co.*, 123 Fed. 271, 59 C. C. A. 289, already cited. The following is the language of the opinion: "A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition therefor. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights, giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge, and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (*City of Chicago v. Mullen*, 116 Fed. 292, 54 C. C. A. 94), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such a time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (*Manistee Lumber Co. v. City of Chicago*, (D. C.) 44 Fed. 87; *Central R. Co. of N. J. v. Penn. R. Co.*, 59 Fed. 192, 8 C. C. A. 86), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

Counsel have referred us to no case outside of this State, nor on an independent investigation do we find any, of collision between sailing vessels under sail and a drawbridge which throws any light on the matter in hand. It is worthy of remark that the two reported cases in this State on the general subject are of just this character.

In *Ripley v. Freeholders*, 40 N. J. Law, 45, in the Supreme Court, the accident occurred at the draw of the county bridge, over the Passaic at Bridge street, Newark, and was due to the failure of the freeholders to keep the bridge in repair, so that it sagged and worked so slowly that the draw tender could not get it open in time. This failure was held to be negligence. In the case of *Mattlage v. Freeholders*, 63 N. J. Law, 583, 7 Am. Neg. Rep. 111, 44 Atl. 756, decided by this court, the collision took place at the Paterson Plank Road bridge spanning the Hackensack river. In that case, as in this, the vessel was sailing free, and the tide running in her favor three miles an hour. The wind was fresh. The mate blew a horn as a signal, and the crew took in the foresail and lowered the mainsail to the third reef, dropped the peak and hauled in the boom. The schooner was then under jib and close reefed mainsail, practically all her sail being the jib, and this necessarily making it impossible, in case of emergency, to bring her up into the wind. At 600 yards the bridge tenders were seen working on the draw as if to open it. At 200 feet, the bridge tender waved his hat, but it was then too late, for the heavily laden schooner, moving six miles an hour, under headsail almost entirely, could not put about or anchor, and an accident was inevitable. It turned out that the bridge was jammed by the expansion of the trolley rails with the heat. It was held that from this condition, which had persisted for some time, the jury was entitled to infer negligence of the freeholders in failing to use proper care in keeping the bridge in repair. It was also argued, but unsuccessfully, that contributory negligence had been conclusively established by comparison of the alleged time that was usually required for the bridge to open and the speed of the schooner, as indicating that the latter was still in a place of entire safety when it became evident that the bridge was not to be open in time. Other testimony, inconsistent with this, was held to raise a jury question. There is no testimony in the case at bar, however, that indicated the time usually required to open the bridge in question, so that a discussion of contributory negligence from that point of view is unnecessary.

From the testimony that, on coming through the wagon bridge and heading for the draw of the railroad bridge, signal was made with a red flag to the boat, and a white flag to an approaching train, and that plaintiff changed his course and lay to until the train had passed and a white flag was then waved, and the draw began to open, when he again headed for the draw, and was allowed without signal, to approach within 150 or 200 yards, that the draw continued to open all that time, and that at that point the particular course of the

plaintiff was indicated to him from the bridge, and no objection made to his proceeding further until within some fifty feet of the bridge, we think it was clearly inferable by a jury that the bridge tenders were aware of plaintiff's intention, invited him to come on, and gave him to understand that the draw would be opened for him; that their failure to open it in time was due, either to a miscalculation of the time required to open it of which they were the sole judges, or of the force of the tide, of which they could judge as well as plaintiff, or both; and that from their conduct, either in inviting the plaintiff too soon, or not warning him back till too late, or tardiness in opening the draw, negligence on their part was a legitimate inference. The duty of railroad companies to maintain and operate draw-bridges over navigable streams and provide bridge tenders thereon, and to open the draws for free passage of vessels, is declared by statute. P. L. 1903, p. 655, §§ 16, 17.

As to the conduct of the plaintiff himself, the question of his negligence was as clearly a jury question. If the tide was running three miles an hour, and he had 400 yards to go, it would take him at that speed, not using his sail, four and a half minutes to reach the draw — apparently ample time for any ordinary draw to open. At a distance of 150 yards he was still one and three-quarter minutes away. The court cannot undertake to fix as a matter of law a limit within his zone of safety, at which, in the absence of a signal from the draw, he should have realized that it would not open in time. Nor can it be said that he was negligent as a matter of law in passing out of the area of safety before the bridge was open or it was absolutely certain that it would be. Vessels are constantly advancing upon bridges, as the reported cases show, and as everyday experience tells us, without waiting for them to open; and on the proper and legal assumption that the tenders will do their duty and give the vessel the right of way to which it is entitled. (On this point the remarks of Judge Jenkins already quoted are most pertinent. Nor can it be said, as a matter of law, that Parker was negligent in losing control of the boat. As we read the testimony, the wind was not dead aft as they entered Rancocas creek, but slightly quartering from the south. At least this inference is permissible. After passing the first draw, they came off Riverside, under the shore. In getting under way again, they started off toward the west, which would be on the port tack, and in turning up the river, either went about or gybed, and with the slight change of course required by the different angle of the railroad bridge must have had the wind nearly or quite abeam. This explains the testimony that Parker slacked off the sheet

to let the wind out of the sail. The situation was then such that the boat would instantly gather steerage way by merely trimming the sail, so that it would fill, and up to within a comparatively short distance of the bridge, might be put about and saved from collision. So far as the tide and other circumstances were concerned, the situation was not of Parker's making. He had to take them as he found them, and do the best he could. If, as the United States courts hold, and we think is the law, he was entitled to assume, in the first instance, that the bridge would be opened in time, and a jury might fairly find, as we think they might have found, that he proceeded on that assumption, carefully, at a slow speed, and received no warning signal, and it did not appear in reasonable view of the situation that the bridge would not be opened until too late to turn back, he cannot be held guilty of contributory negligence. All these matters of fact a jury might on the evidence have found in his favor.

The first section of Bridge Act 1833, as amended in 1894 (Gen. St. 1895, pp. 313, 314, §§41-47), imposing a penalty on commanders of vessels for failure to lower their sails on approaching draw-bridges, which was discussed in *Ripley v. Freeholders*, *ubi supra*, was not adverted to in the court below, nor mentioned in the briefs of counsel in this court, so perhaps it needs no notice here. It may as well be said, however, that the "lowering of the sails" required, was held by the Supreme Court in the *Ripley* case, to be such as in the language of the statute would "enable the vessel to pass gently through." We see no reason for questioning at this time the propriety of that decision; and if, as was testified in this case, the sail had no effect on the speed of the boat, it was immaterial whether it was raised or lowered, and no negligence could be predicated on a failure to lower it, especially in view of the defendant railroad's claim that, in effect, it was negligence not to keep the sail full.

We conclude, therefore, that both defendant's negligence and plaintiff's contributory negligence were questions for the jury, and the nonsuit was wrong. The judgment of the Supreme Court will therefore be reversed and a *venire de novo* awarded.

GUMMERE, C. J., and REED, VOORHEES, MINTURN, GRAY, DILL and VREDENBURGH, JJ., *dissent*.

HARRIS v. DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. ET AL.

Supreme Court, New Jersey, February, 1909.

1. CARRIER OF PASSENGERS—TICKET—DAMAGES—MENTAL SUFFERING.—In an action against a railroad company for conversion of a ticket, the evidence justified an inference that the ticket was taken up by the defendant's conductor after a public altercation with the passenger. *Held*, that it was not erroneous to charge that the plaintiff was entitled to damages for injury to his feelings and the ignominy thrust upon him, if the jury found there was any.
2. "COMMUTATION TICKET"—CONDITIONS—VALIDITY.—A stipulation in a "commutation ticket" that it is not transferable, and, if offered by any other than the person to whom it is issued, it will be forfeited and taken up by the conductor, is valid and binding (1).
3. FORFEITURE OF TICKET—RIGHT TO TAKE UP TICKET.—Where a "commutation ticket" contains a stipulation that, if offered by any other person than the person to whom it is issued, it will be forfeited and taken up by the conductor, the right to take it up is not limited to the occasion when it is presented by a person other than the owner. If the condition has been already violated, the ticket may be taken up when presented by the owner himself.
4. SAME.—A right to forfeit a railway ticket for violation of its terms can only be exercised when those terms have been violated with the permission or connivance of the owner of the ticket.
5. TICKET—VIOLATION OF CONDITIONS—EVIDENCE—OTHER ACTS OR TRANSACTIONS SHOWING KNOWLEDGE.—Where there is proof that a railway ticket has been offered for fare by others than the owner in violation of its terms, it is admissible for the purpose of proving that the wrongful use of the ticket was with the permission or connivance of the owner to prove the misuse of other similar tickets.

(Syllabus by the Court.)

ERROR to Court of Common Pleas, Morris County.

ACTION by Joseph Harris against the Delaware, Lackawanna & Western Railroad Company and another. From judgment for

1. *Carrier of passengers—Ticket.*
— See NOTE ON LIMITATION OF TICKETS at end of case at bar.

See also AMERICAN NEGLIGENCE DIGEST (1909 edition) where the cases

reported in Vols. 1-20 AM. NEG. REP. (1897-1907) are digested and collated under the title, "TICKET," with its several sub-titles relating to various kinds of tickets.

plaintiff, defendant brings error. The facts are stated in the opinion. *Judgment reversed.*

ARGUED November term, 1908, before GUMMERE, CH. J., and SWAYZE and TRENCHARD, JJ.

ARTHUR F. EGNER and ROBERT H. McCARTER, for plaintiff in error.

ELMER KING, for defendant in error.

SWAYZE, J. — This is an action for conversion of a railroad ticket.

The defendants are the railroad company and the conductor who took up the ticket. They justify upon the ground that the plaintiff had allowed other persons than himself to travel thereon, and that, by the terms of the ticket, it was thereby forfeited. The ticket was in the possession of the plaintiff himself at the time. There was testimony on the part of the defendant that two other persons had traveled upon the same ticket a few days before. There was an offer to prove that the plaintiff permitted other persons to ride on this ticket or similar tickets previous to the occurrence complained of, but this offer was overruled by the trial judge. He allowed the plaintiff over defendant's objection, to prove the conversation and manner of the conductor at the time, and charged the jury that the plaintiff was entitled to recover such damages as might compensate him for the value of the ticket at the time it was taken up; and also such damages as they thought just and proper under the circumstances of the case for injury to his feelings and the ignominy thrust upon him, if they found there was any. In response to a request of the plaintiff, he charged that, if the ticket was improperly taken up, the plaintiff was entitled to the extra cost of going to New York, evidently referring to the day in question. He refused to charge a request on the part of the defendant that in seeking to determine whether or not there has been a forfeiture of the ticket through the misuse the jury has a right to take into consideration the evidence of the misuse by the plaintiff of other similar tickets, as indicating a custom or habit in the plaintiff to permit other persons than himself to ride on his ticket.

It is argued on behalf of the plaintiff in error that it was erroneous to allow recovery of damages for the indignity and ignominy. The suggestion is that these damages are limited to personal torts, and cannot be allowed where the tort is merely the conversion of personal property. We are unable to see the distinction on principle. In the case of injuries to the person, indignity and ignominy are the almost necessary accompaniment. In injuries to personal property the tort would not so often, perhaps not generally, be accompanied

with circumstances of indignity and ignominy, but it may be so accompanied, and we think such a case is now presented. There was an altercation between the conductor and the passenger in the presence of other passengers, and it was competent for the plaintiff to prove these circumstances, as he was allowed to do, and it was for the jury to decide whether they amounted to an indignity. Cases upon the subject do not seem to be very numerous, but the principle is recognized in *Sedgwick on Damages*, § 44. He cites the case of *Meagher v. Driscoll*, 99 Mass. 281, where the tort was trespass to real estate. The court said:

“He who is guilty of a wilful trespass or one characterized by gross carelessness and want of ordinary attention to the rights of another is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness as well as those of wilful mischief often inflict a serious wound upon the feelings when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. Damages in such cases are enhanced not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.”

The recovery of damages for mental anguish in actions of libel has been recognized in a recent case in this court. *Knowlden v. The Guardian Printing Co.*, 69 N. J. Law, 670, 55 Atl. 287. And the distinction between such mental anguish or mortification and physical illness was pointed out by this court in *Butler v. Hoboken Printing & Pub. Co.*, 73 N. J. Law, 45, 50, 62 Atl. 272. In the latter case the plaintiff was denied recovery for damages for physical illness upon the ground that they were not the natural and proximate consequence of the defamatory words. We think, that, where the indignity is the natural and proximate result of the conduct of the defendant, damages should be recovered, and in a case where a railroad company takes up a passenger's ticket illegally and in a public manner with circumstances virtually amounting to an imputation of fraud a proper case is presented. In this respect we find no error.

The trial judge properly charged that the measure of damages, aside from damages for the indignity, was the value of the ticket. When he added that the plaintiff might also recover the extra cost of going to New York on paying his way, he in effect allowed a double recovery; for the value of the ticket would depend upon

what it cost to supply its place for the rest of the month for which it was issued, and the charge permitted the plaintiff to recover damages in addition for the loss on the particular journey which he was then making.

A more serious error was the refusal of the trial judge to charge the request of the defendant which we have quoted. The contract printed on the ticket reads as follows, so far as essential to this case:

"That it is not transferable, and if offered by any other than the person to whom it is issued, it will be forfeited and taken up by the conductor."

Such a stipulation, it has been held, is valid and binding. *Eastman v. Maine Cent. R. Co.*, 70 N. H. 240, 46 Atl. 54; *Balt. & Ohio S. W. R. Co. v. Evans*, 169 Ind. 410, 82 N. E. 773.

We think the proper construction of this contract is that the ticket, if used by any other person than the person to whom it was issued, became thereby forfeited, and that it might be taken up by the conductor, either at the time or at any subsequent time when it was offered, whether by the plaintiff or some one else. *Friedenrich v. Baltimore, etc., R. Co.*, 53 Md. 201. Such a construction is necessary to the fair protection of the rights of the railroad company under the contract. It may often happen that the ticket may be offered by a person not entitled to use it, and the fraud may not at the time be known to the conductor or the company, and may only be discovered when the ticket is subsequently offered by another person, who may well be the rightful owner. The provisions for forfeiture would be of very little value to the company if the right to take up the ticket was limited to the occasion when it was offered by some one other than the owner. We think, however, that the right to forfeit can only arise out of a wrongful act on the part of the owner of the ticket, and that it does not arise merely from the fact that the ticket is offered by a person other than the owner, since that may be done against the owner's will. Where the company insists upon a forfeiture, it therefore becomes important for it to prove not only that the ticket had been offered wrongfully, but that this had been done with the permission or connivance of the owner. *Mueller v. Chicago, etc., R. Co.*, 75 Minn. 109, 77 N. W. 566. Substantially the forfeiture is allowed for a fraudulent breach of the contract.

There would be no difficulty in applying these rules to the present case if the evidence offered and the request to charge had been limited to the ticket in question. As to that ticket, there was proof which carried the case to the jury, but the offer and the request

related to tickets other than the one which was actually taken up. We think that this evidence also was proper and the request was justified.

In determining whether the wrongful offer of the ticket was with the permission or connivance of the owner, his intent becomes not only relevant, but important, and it is very well settled by the authorities that, when the intent of a person is relevant, acts and conduct on his part which evince or logically tend to prove his intent are admissible even though they prove an offense different from the particular offense charged. The question has most frequently arisen in criminal cases, and the rule was well stated by the late Mr. Justice Dixon in *State v. Raymond*, 53 N. J. Law, 260, 264, 265, 21 Atl. 328. We there recognized the general rule that upon the trial of a person for one crime evidence that he has been guilty of other crimes is not relevant, but we held, also, that an exception was to be made when the acts charged to be criminal may reasonably be innocent, and are criminal only when performed with a certain intent or with knowledge of a certain fact. In such case, other acts of the defendant, though criminal, may be adduced to prove that he had such specific intent or knowledge. Justice Dixon added: "And in general it may be said that, whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown." An early case upon the subject is *State v. Robinson*, 16 N. J. Law, 507, where upon the trial of an indictment for uttering a forged note it was held competent, in order to show a *scienter*, to prove that the prisoner uttered another forged note on the same bank on the same day, and that too in spite of the fact that he had been acquitted on a trial for that offense. A later case is *State v. Snover*, 65 N. J. Law, 289, 47 Atl. 583, in which the Court of Errors and Appeals sustained a conviction for adultery, where the trial judge had admitted testimony of another act of adultery committed in another county upon the ground that it proved the relations and mutual dispositions of the parties. The subject is discussed with great care and with ample reference to the authorities in Prof. Wigmore's edition of *Greenleaf on Evidence*, § 149, where the author carefully points out the distinction between proof of other acts as bearing upon the question of intent and proof of them for the purpose of establishing the commission of the very act to be proved. The notes are sufficient to show that the same principle is applicable to civil cases.

In the present case there was direct evidence by two witnesses of the use of the ticket by two persons other than the plaintiff. The fact as to the misuse of other tickets was admissible to show intent, and this error alone would require reversal. The request to charge should also have been granted. It was carefully limited to a request that the jury take into consideration the evidence of the misuse by the plaintiff of other tickets, as indicating a custom or habit in the plaintiff to permit other persons than himself to ride on his ticket. The judge was not asked to charge that the misuse of other tickets would tend to prove the misuse of the ticket in question. In substance, the request amounted to asking for a charge that, assuming that the jury believed the testimony of the two conductors, they could, in determining whether the use of this ticket by the two strangers was a misuse justifying a forfeiture, consider the plaintiff's habit and custom with similar tickets.

For the reasons stated, the judgment is reversed.

NOTES OF CASES ON THE QUESTION OF LIMITATIONS AND CONDITIONS ON PASSENGERS' TICKETS.

In connection with *HARRIS v. DEL., L. & W. R. Co.* (N. J.) 72 Atl. 50, 21 AM. NEG. REP. 202 (preceding case reported), see the following cases, among others, reported in the series of AM. NEG. CAS. and AM. NEG. REP.:

Recent Cases:

"**Stop-over ticket.**"—In *LEYSER v. CHICAGO, BURLINGTON & QUINCY R. R. Co.* (Missouri Appeals, Kansas City, May, 1909), 119 S. W. 1068, appeal from judgment for plaintiff for \$600 actual, and \$400 exemplary, damages, rendered in the Jackson County Circuit Court, in an action for such damages for alleged wrongful expulsion from a passenger train, judgment for plaintiff was *affirmed*. The opinion was rendered by JOHNSON, J., who discussed the question of a ticket as a contract, with especial reference to a "stop-over" ticket, that being the subject at issue in the case. The points (among others) decided are stated in the syllabus to the report of the case in 119 S. W. Rep. as follows:

"Where a passenger pays full fare for a ticket, it is not regarded as the contract between him and the carrier, but as a mere token thereof, and in such cases the law itself fixes the terms of the contract which controls the relationship of the parties; but, where the ticket purports on its face to express a contract between them, and its conditions and restrictions, at variance with the conditions the law would impose, are supported by a consideration, the ticket itself is the contract of transportation, and its reasonable and lawful conditions and restrictions will be enforced by the courts." [Citing *Boling v. R. R. Co.*, 189 Mo. 219, 88 S. W. 35; *Cherry v. R. R. Co.*, 191 Mo. 489, 90 S. W. 381; *Mosher v. R. R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324; *Boylan v. R. R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50.

"The third clause in a return ticket over different lines imperatively required the purchaser to begin the return trip on the date stamped on it by the validating agent, and to keep on traveling till he arrived at his destination, allowing three days for the trip, which it appeared would be consumed in traveling over the route called for. Another clause provided that it was subject to the stop-over regulations of the line over which it reads. *Held*, that this meant that the other clauses of the contract, including the third, were subordinated, and made subject to it; and, by complying with the stop-over regulations in such case, the purchaser had the right to stop off on his return trip, and would not be required to complete the journey in three days after he began it."

It was also *held* that where a passenger's ticket has expired, the conductor may refuse same and eject the passenger for refusal to pay fare, but he has no right to employ unnecessary force nor to assault and insult him with abusive or threatening language, and in case of the latter punitive as well as actual damages may be recovered by the passenger in an action against the company (citing *Glover v. Ry. Co.*, 129 Mo. App. 563, 108 S. W. 105). WARNER, DEAN, McLEOD & TIMMONDS appeared for defendant (appellant); ANGEVINE, CUBBISON & HOLT, for plaintiff (respondent).

"**Coupon ticket.**"—In *BRIAN v. OREGON SHORT LINE R. R. Co.* (*Montana*, December, 1909), 105 Pac. 489, appeal from a judgment for plaintiff for \$750 in an action in the District Court, Silver Bow county, against defendant for unlawful ejection from one of its passenger cars, judgment was *reversed* for several errors. The opinion was rendered by HOLLOWAY, J., who in the course of it, said: "While there are some contradictions in the evidence, we think these facts appear: On August 12, 1907, Henry Mulholland paid to J. G. Nash, who was city ticket agent for the Great Northern Railway Company at Butte, and apparently a local agent for that steamship company known as the White Star Line, the sum of \$76.25 to purchase steamship and rail transportation for the plaintiff from Liverpool to Butte. Later the plaintiff took passage at Liverpool, and on September 28th landed in New York city. On the same day he secured from the Erie Road a third-class limited coupon ticket to Butte, which routed him over the Erie Road from New York to Chicago, over the Chicago, Rock Island & Pacific from Chicago to Denver, over the Colorado Midland from Denver to Grand Junction, over the Rio Grande Western from Grand Junction to Ogden, and over the Oregon Short Line from Ogden to Butte. The ticket contains several stipulations, one for a continuous passage, and another that the ticket would not be accepted for passage unless used to destination before midnight of October 4, 1907. The plaintiff left New York on September 29th, was delayed four hours in Chicago, eighteen hours in Denver, and the train which carried him into Ogden was three hours late. He arrived in Ogden about six o'clock on the morning of October 5th, and, when he presented himself for passage on the first Oregon Short Line train bound for Butte on the afternoon of that day, he was refused carriage on his ticket because it had expired. The body of the ticket, above the attached coupons contains the terms and conditions of the contract and bears a signature purporting to be that of the plaintiff." * * *

The court held that it was immaterial whether plaintiff signed the ticket or not, as in accepting and acting upon it he assented to all its terms and conditions as fully as if he had read and signed it. Continuing, the learned judge said: "By agreeing to the provision in the ticket, 'good for one continuous passage,' the plaintiff merely bound himself that once on any of the lines of road over which he was routed he would pursue his journey over that road continuously or without interruption. In other words, he agreed that he was not entitled to any stop-over privileges from any one of the lines of roads. 4 Elliott on Railroads, § 1596; 2 Hutchinson on Carriers, § 1048. The provision in the ticket that it would not be accepted for passage unless used to destination before midnight of October 4th, if construed literally, would require the journey to Butte to be completed before the hour named; but by its requested instruction No. 8 defendant concedes that it was only necessary for plaintiff to take passage on one of defendant's trains bound for Butte before midnight of October 4th. Apparently counsel for plaintiff contend that it was only necessary for plaintiff to commence his journey from New York city before the date which fixed the limit of the ticket's duration; for in their brief they say: 'We claim that the ticket was used before midnight of October 4, 1907. It was used in the city of New York when he entered the Erie Railway. It was used in Denver. * * *' But this argument begs the question; for it implies that the contract only requires the ticket to be used before midnight of October 4th, while the contract provides that it shall be used to destination before that hour. The court cannot make for these parties a contract different from the one they themselves executed. The utmost that we can do is to construe the contract as it is written. * * *

"So far as we are able to determine, the authorities are unanimous in holding that the body of the ticket and each coupon constitute a separate and distinct contract between the passenger and the particular line of road over which the coupon furnishes transportation. In other words, under the facts of this particular case as shown by this record, the plaintiff had one contract with the Erie Road to carry him from New York to Chicago; a separate contract with the Rock Island to carry him from Chicago to Denver; and other separate contract with the Colorado Midland to carry him from Denver to Grand Junction; still another distinct contract with the Rio Grande Western to carry him from Grand Junction to Ogden; and, finally, a separate contract with the Ogden Short Line to carry him from Ogden to Butte. The following are some of the authorities announcing the rule: *Boling v. St. Louis & S. F. R. Co.*, 189 Mo. 219, 83 S. W. 35; *Railway Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039; *Auerbach v. N. Y. Cent., etc., R. Co.*, 89 N. Y. 281, 8 Am. Neg. Cas. 555; *Chicago & A. R. Co. v. Mulford*, 162 Ill. 522, 44 N. E. 861; *Young v. Railroad Co.*, 115 Pa. St. 112, 7 Atl. 741; *Spencer v. Lovejoy*, 96 Ga. 657, 23 S. E. 836; 2 Hutchinson on Carriers, § 1049; 4 Elliot on Railroads, § 1596. The rule is announced in 6 Cyc. 571. In speaking of a ticket such as the one before us, it is said: 'A ticket thus sold is not a through contract, and the right of the purchaser and the responsibility of the different companies are the same as though separate tickets had been purchased by him from each, and each is responsible for injury suffered on its line, and not otherwise.' * * *

"If, then, the plaintiff's contract with every road which he traveled was his separate contract with that road only, it follows as a matter of course that this defendant cannot be held responsible for delays occasioned by any other road or roads. This rule is tersely stated in 28 Am. & Eng. Ency. Law (2d ed.) 178, as follows: 'If the ticket is in coupon form and expressly provided that the carrier selling it is merely the agent of the connecting roads, and is not responsible beyond its own line, the passenger is not entitled to be carried over the last road after the time has expired, although he is delayed by the fault of one of the other companies,' and the authorities generally support the text. The evidence offered by plaintiff in explanation of his delays at New York city and while *en route* may tend to exculpate him from any charge of negligence or other fault, but it does not explain the delays after all. It does not explain whether the delay in Chicago was occasioned by the fault of the Erie Road in not getting him to Chicago on time, or the Rock Island Road in not leaving on time; and the same thing is true with respect to the delay of eighteen hours in Denver. The difficulty which confronts us is occasioned by the fact that the evidence on this point is so meager that we cannot tell where the blame should be placed; and we cannot assume from the mere fact that plaintiff did not reach Ogden in time that the selling agent in New York placed an unreasonable limit on the ticket in allowing six full days, not counting the day upon which the ticket was issued, for plaintiff to make the journey from New York to Ogden; and, since plaintiff raises the question by relying upon a ticket which on its face had expired when offered for passage, the burden of proof is upon him to show that the limitation is unreasonable, and in this we think he failed. In the absence of such showing, the plaintiff's contract with the Oregon Short Line required him to present his ticket for passage between Ogden and Butte before midnight of October 4th, and, failing to do so, he was not entitled to be carried over defendant's road by virtue of that ticket, and defendant's conductor could properly refuse to permit him to board the train at Ogden, or could eject him from the train, if in doing so he used no more force than was necessary to accomplish the purpose." * * *

On the question of damages the court considered plaintiff, in view of the evidence, entitled to little more than nominal damages. J. L. WINES and JOHN G. WILLIS, appeared for appellant; BREEN & HOGEVOLL, for respondent.

"Mileage ticket." — In ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO. v. BROWN, (*Arkansas*, December, 1909) 123 S. W. 763, judgment for plaintiff for \$50 in the Circuit Court, Clark county, in action for ejection from one of defendant's passenger trains, the conductor refusing to receive mileage ticket the contract for which had terms prohibiting its use under certain conditions, was *reversed*. The point decided is stated in the syllabus to the report in 123 S. W., as follows: "A passenger, knowing that his mileage book is not, under the express terms of the contract, good for passage between points in the State, is bound by the terms thereof, and he cannot recover for his expulsion from a train for his failure to pay fare after refusal to accept his mileage, where the ejection is unattended by any circumstances of insult." Opinion by HART, J.

"Coupon ticket."—In *WELLS v. BOSTON & MAINE R. R. Co.*, (*Vermont*, February, 1909) 71 Atl. 1103, appeal from judgment for plaintiff in Essex County Court in an action for assault and battery and ejection from train, judgment was reversed for several errors in admission of evidence and on question of damages. The opinion was rendered by WATSON, J., and among the points decided are the following set out in the syllabus to the report in 71 Atl. 1103:

"Under a declaration, in an action against a railroad alleging assault and battery and wrongful ejection of a passenger from a train, plaintiff could show that he purchased a ticket having three coupons, the first entitling him to ride to a fair, the second to attend the fair, and the third to return passage; that on his return the conductor took up his ticket; that thereafter there was a change of conductors; that the new conductor refused to accept plaintiff's statement that he had already surrendered his ticket, and demanded the fare, and on plaintiff's refusal to pay it, forcibly ejected him.

"P. S. 1656, provides that no judgment of a justice, where an appeal is not allowed, shall be an estoppel on a question or matters not therein expressly adjudicated, and no right of recovery shall thereby be established on a collateral matter. In an action against a railroad for wrongful ejection of a passenger from a train, it appeared that on plaintiff's surrender of his ticket the conductor failed to give him anything as evidence of his right to a passage; that thereafter a new conductor demanded the ticket, and on his failing to produce it, ejected him; that a friend thereupon paid the fare, and plaintiff continued his journey; that later plaintiff recovered judgment against defendant before a justice of the peace for the amount so paid. *Held*, that plaintiff's right to be on the train without producing a ticket or paying his fare not having been expressly adjudicated in the action before the justice, the admission of the former recovery as conclusive evidence that plaintiff was rightfully on the train at the time of his ejection, and of his right to recovery in the subsequent action, was error.

"In an action against a railroad for wrongful ejection of a passenger from a train, an instruction that if the jury found for plaintiff, and that if his ejection was wilful and malicious, they might give exemplary damages, was erroneous, as permitting an award of exemplary damages regardless whether defendant was guilty or not of the wrong committed by its servant by directing, participating in, or subsequently approving it." (Citing *Willett v. St. Albans*, 69 Vt. 330, 38 Atl. 72, following *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. Rep. 261, 8 Am. Neg. Cas. 703).

Cases in Am. Neg. Cas.

In *MANNING v. LOUISVILLE & N. R. R. Co.*, 95 Ala. 392 (8 AM. NEG. CAS. 268), it was held that a regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is a reasonable one. The Manning case was an action arising out of an ejection from train of passenger traveling on forfeited ticket. *The ticket was

purchased at reduced rates, and on certain conditions as to its use, which were printed on the ticket and subscribed to by the plaintiff. Judgment for defendant affirmed.

See also *McGhee (Rec'rs) v. Drisdale*, 111 Ala. 597 (8 AM. NEG. CAS. 304), where judgment for plaintiff was reversed in action for ejection on refusal to pay fare after conductor declined to accept a forfeited ticket.

See *Little Rock & Ft. S. Ry. Co. v. Dean*, 43 Ark. 529 (8 AM. NEG. CAS. 31), where the question of a limited ticket which had expired, was passed upon, and a judgment for plaintiff, who was ejected from train, was affirmed.

In *Lewis v. Western & Atlantic R. R. Co.*, 95 Ga. 225 (8 AM. NEG. CAS. 1354), passenger ejected from train, it was held that there being no evidence that the plaintiff, in ordering his ticket, communicated to the agent who sold it that a ticket was wanted different from that which he received, and that ticket having expired by its own limitation, according to its face, before he took the train from which he was expelled, there was no error in granting a nonsuit.

According to the Georgia Code, § 2068, a common carrier cannot limit his legal liability by any notice or entry on tickets sold. Without making an express contract with the passenger, a railroad company cannot, after selling a return ticket and receiving pay therefor, exact of the passenger as a condition of returning on the ticket that he shall sign it and that the signature shall be attested by a given agent who shall stamp it. This is true, although the ticket delivered to the passenger be sold at a reduced price and limited as to time and may indicate on its face that it is to be signed, attested and stamped, and that it cannot be used unless these requisites be complied with. Nonsuit reversed. *Phillips v. Georgia R. R. & B. Co.*, 93 Ga. 356 (8 AM. NEG. CAS. 135).

In *Pennington v. Philadelphia, W. & B. R. R. Co.*, 62 Md. 95 (8 AM. NEG. CAS. 346), where plaintiff was ejected from train on refusal to pay fare after tendering lapsed excursion ticket which conductor would not accept, judgment for defendant was affirmed. The court (per BRYAN, J.), after discussing the question as to ticket being a contract, said: "Where the ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses the ticket, he makes a contract with the company according to the terms stated, and the reduction in the fare is the consideration for his contract. * * * The railroad company agrees to carry him at the reduced rate, upon the conditions stated on the face of his ticket; if he agrees to those terms the contract is consummated; but he cannot take advantage of the reduction of the rate and reject the terms on which alone the reduction was made."

In *Johnson v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 63 Md. 106 (8 AM. NEG. CAS. 355), it was held that "a passenger purchasing a ticket at a reduced rate with conditions 'for a continuous trip only' and 'not good to stop off,' cannot stop off at an intermediate station, and the agents of the railroad company are justified in refusing to accept ticket on his getting on another train, and demanding fare and in ejecting him on refusal to pay the same.

In *Post v. Chicago N. W. R. R. Co.*, 14 Neb. 110 (8 AM. NEG. CAS. 497), it was held that "a regulation of a railroad company providing for

cheaper rates of fare between certain points, provided the ticket is used alone by the person purchasing the same and within a certain number of days from the date of issue, is reasonable and proper." It was also held that "a person buying from another a non-transferable ticket is not entitled to use the same and cannot recover damages for being required to leave the train."

See *Elmore v. Sands*, 54 N. Y. 512 (8 AM. NEG. CAS. 553n), where the right to eject person from train who refused to pay fare on conductor declining to accept ticket which, being stamped "good for this date only," was out of date, was passed upon.

See *Hall v. Memphis & Charleston R. R. Co.*, (U. S. C. C., W. D. Tenn.) 9 Fed. Rep. 585, (AM. NEG. CAS. 705n), on the question of expiration of time limit on ticket.

See *Wyman v. Northern Pac. R. R. Co.*, 34 Minn. 210 (8 AM. NEG. CAS. 438), on the question of continuous trip and "stop-over" privilege.

See *Rogers v. Atlantic City R. R. Co.*, 57 N. J. L. 703 (8 AM. NEG. CAS. 511), as to "commutation ticket"

See *Pennsylvania R. R. Co. v. Spicker*, 105 Pa. St. 142 (8 AM. NEG. CAS. 617n) where conductor refused to accept return coupons tendered more than two years after ticket had been sold, and ejected passenger; judgment for plaintiff affirmed.

See *Texas & Pacific Ry. Co. v. Dennis*, 4 Tex. Civ. App. 90 (8 AM. NEG. CAS. 639n); expiration of excursion ticket issued by railway company to persons attending sale of lots in distant city; diligence used after sale to make return trip; conductor's refusal to accept ticket; passenger ejected; judgment for plaintiff affirmed.

See *Shedd v. Troy & Boston R. R. Co.*, 40 Vt. 88 (8 AM. NEG. CAS. 650n); expiration of ticket "good for this day and train only;" right to eject on tender of expired ticket; plaintiff not entitled to recover.

See *Rudy v. Rio Grande W. Ry. Co.*, 8 Utah, 165 (8 AM. NEG. CAS. 650n); right to eject on tender of expired ticket; judgment for plaintiff reversed.

See *Oppenheimer v. Denver & R. G. R. R. Co.*, 9 Colo. 89 (8 AM. NEG. CAS. 89n), on the question of limitation of mileage tickets.

See *Churchill v. Chicago & Alton R. R. Co.*, 67 Ill. 390 (8 AM. NEG. CAS. 170n), where passenger tendered a lay-over ticket which had expired, and was ejected for refusal to pay fare demanded.

Cases in Am. Neg. Rep.

In *Spieß v. Erie R. Co.*, (N. J. Sup. 1904) 16 AM. NEG. REP. 510, where plaintiff bought a thousand-mile ticket issued by the Erie R. Co., and sought to ride on the Central R. Co., but was ejected from the car of the latter company, he could not recover from the company issuing the ticket as he was bound by the express condition on the ticket that the defendant assumed no responsibility beyond its own lines on the thousand-mile ticket. Judgment for plaintiff reversed.

See *Norman v. Southern R. Co.*, (S. C. 1903) 14 AM. NEG. REP. 468, time limit expiring on ticket and passenger ejected, where it was held that "a person who purchases a general ticket, paying full fare therefor,

is not bound by limitations printed thereon, unless his attention has been called to them, and the posting of notices in the waiting rooms, ticket offices and on the cars is not sufficient to charge the passenger with notice of such limitations." Judgment for plaintiff affirmed. Citing and quoting at length on this point the case of *LOUISVILLE & N. R. Co. v. TURNER*, (Tenn. 1898) 47 S. W. 223 See the *Turner* case, *supra*, quoted in 14 AM. NEG. REP. 471-473.

See *Rolfs v. Atchison, T. & S. F. R. Co.*, (Kan. Sup., 1903) 13 AM. NEG. REP. 291, expiration of thousand-mile ticket, where railroad company was held not liable for election of passenger tendering such a ticket. "A railroad ticket containing a full and unambiguous printed contract, signed in ink by the purchaser, that it should expire on a date shown by punch marks on its margin is conclusive evidence to the train conductor of the contract between the passenger and the carrier as to the time the ticket continues in force."

In *Southern Ry. Co. v. Watson*, (Ga., 1900) 8 AM. NEG. REP. 367, it was held that a carrier of passengers has the legal right to make reasonable rules and regulations for conduct of its business in transportation of passengers, and a regulation affixing time limit on ticket is valid.

In *Southern Ry. Co. v. Watson*, (Ga., 1909) 8 AM. NEG. REP. 367, it was ejection of passengers from cars, etc., appended to the *Watson* case (preceding paragraph) in 8 AM. NEG. REP. 367-368

In *Trezona v. Chicago Great Western Ry. Co.*, (Iowa, 1898) 5 AM. NEG. REP. 142, it was held that "one who purchases a first-class ticket marked across the face of it the words 'not good after date of sale' is not entitled to passage over the railroad issuing it when presented a year after its date."

See note of cases bearing on the validity of passengers' tickets, 7 Am. Neg. Rep. 215.

See also Notes of Cases bearing on Liability of Carriers for Mistakes of Agents in selling tickets, 7 AM. NEG. REP. 385-387; also numerous actions in Vols. 1-20 AM. NEG. REP., arising out of ejection of passengers through mistakes of agents in selling tickets.

TOWLER v. NEW JERSEY ADAMANT MANUFACTURING COMPANY.

Supreme Court, New Jersey, November, 1909.

MASTER AND SERVANT—SERVANT INJURED BY FLYING OBJECT—DEFECTIVE APPLIANCE—NOTICE OF DEFECT—PROMISE TO REPAIR—QUESTION FOR JURY.—When a servant, at work on a machine or appliance provided by the master, discovers it is out of order, and promptly reports that fact to the master or his proper representative, who promises to have the proper repairs made, and the servant thereupon continues his work, the questions whether the servant apprehended danger to himself, and should have been understood by the master as complaining of such danger,

and whether the servant was justified in accepting the promise of repair as predicated on such understanding, will ordinarily be for the jury (1).

(*Syllabus by the Court.*)

Applied, in an action for damages for injuries to plaintiff's eye caused by a substance flying from an alleged defective apparatus at which he was working for defendant (2).

1. For *Master and Servant Cases* from the earliest period to 1896, see Vols. 13-16 AM. NEG. CAS., where the same are classified and chronologically arranged in alphabetical order of States. The New Jersey cases are reported in Vol. 16 AM. NEG. CAS. Subsequent actions to date are reported in Vols. 1-21 AM. NEG. REP.

See also AMERICAN NEGLIGENCE DIGEST, (1909 edition) where the cases reported in 1-20 AM. NEG. REP., (1897-1907) are collated under the title Master and Servant, with its several divisions and subdivisions relating to the duties and liabilities arising out of the relations of employer and employee.

2. *Flying objects — Splinter from rip-saw.* — In *SUCHOMEL v. MAXWELL ET AL.* (*Illinois Supreme*, April, 1909) 88 N. E. 558, judgment for plaintiff in the Appellate Court, First District, affirming judgment in the Circuit Court, Cook county, was *affirmed*. The action was for injuries caused by a splinter from a rotary rip-saw used in defendant's factory for sawing and planing lumber, flying from the machine and striking plaintiff, an employee, in the eye, the machine not being equipped with a hood or apron. Plaintiff did not assume risk by continuing to operate machine on promise of defendant's foreman to cover the saw. Opinion by SCOTT, J.

Steel from hammer. — In *GOLDEN v. ELLIS*, (*Maine*, May, 1908) 71 Atl. 649, exceptions to nonsuit, the case is stated in the official syllabus (paragraph 6) as follows:

"The plaintiff and a fellow-servant were engaged in squaring up a certain stone from which a corner had been broken. The plaintiff was holding a bull-set, a steel implement, along one of the lines marked on the stone. His fellow-servant then struck the bull-set with a steel striking hammer, and a small piece of steel chipped off one corner of the face of the hammer and flew into the plaintiff's left eye, resulting eventually in the loss of both eyes. The plaintiff was employed by the defendants primarily as a blacksmith to sharpen tools, and, when not engaged in that capacity, he was to work 'elsewhere as an all-round' man. His experience as a tool-sharpener comprised a period of fifteen years, and he had learned from his experience that steel implements were rendered brittle by overheating and over-hardening in the process of manufacture or sharpening, and that, in the use of such tools, pieces of steel were liable to be broken off and fly from a hammer as well as from other tools. Prior to the accident, he had noticed numerous fire cracks or checks on the face of the hammer used by his fellow-servant, and knew that it had been burned and was brittle, and that it was liable to break and chip whenever used, but he never made any complaint in regard to the defective condition of the hammer, and never made any request or suggestion that it should not be used in connection with any work that he

ERROR to Circuit Court, Hudson County.

ACTION by David Towler against the New Jersey Adamant Manufacturing Company. From judgment for defendant, plaintiff brings error. The case is stated in the opinion. *Judgment reversed.*

ARGUED June term, 1909, before GUMMERE, CH. J., and GARRISON and PARKER, JJ.

SAMUEL KALISCH, JR., for plaintiff in error.

FREDERIC J. FAULK, for defendant in error.

was required to perform. He had never received from the defendants any request to continue in their service until another and suitable hammer should be supplied or any assurance that any other or different hammers would be used in connection with his work. He was not placed in a position where he was exposed by the nature of his duties to any undisclosed or unknown dangers. The precise condition of the defective hammer was not concealed from him nor the danger of using it unknown to him. *Held*, 1, that, as the plaintiff fully understood and appreciated all the dangers to which he would ordinarily be exposed arising from the use of the overhardened hammer in connection with any branch of his work, he must be deemed to have voluntarily assumed the risks incident to his employment after full knowledge of the defective condition of the hammer used in connection with the service which he was required to perform; 2, that a nonsuit was properly ordered." Opinion by WHITEHOUSE, J.

Steel from machine—In *ANDERSON v. MARRINAN ET AL.*, (*Massachusetts*, May, 1909) 88 N. E. 782, plaintiffs' exceptions to judgment for defendant in the Superior Court, Middlesex county, were sustained. The opinion by BRALEY, J., states the case as follows:

"It would have been competent for the jury to find, from the testi-

mony of the experienced machinists called by the plaintiff, that the head of the pin of a tube expander is not usually hardened, but left soft, and when struck with a hammer used for such work, if properly annealed, it will 'upset or roll over,' but will not splinter, nor fly. The defendants, having engaged to provide suitable appliances, admitted that the expander furnished had been hardened, and the inference could have been properly drawn that because of this condition it had been rendered brittle, and unsuitable for the plaintiff's use. It was while using this defective expander, in the usual course of his work to enlarge a boiler tube, that a small piece of steel flew from the head, destroying the sight of his left eye. But if there was evidence of the defendants' negligence, they endeavored to retain the verdict ordered in their favor upon the ground that the plaintiff assumed the risk. It has been often decided that a servant does not assume the risk of defective ways, works, or machinery whether at common law or under Rev. Laws, c. 106, § 71, unless the defects are either known or obvious. *Jellow v. Fore River Shipbuilding Co.*, 201 Mass. 464, 87 N. E. 906; *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 15 Am. Neg. Cas. 583, 32 N. E. 1119. If believed, the plaintiff's evidence would have warranted a finding that the defec-

PARKER, J. — This writ of error brings up for review the action of the trial court in directing a verdict for the defendant below. Plaintiff was an employee of defendant, and while at work in defendant's factory for the manufacture of wall plaster lost the sight of one eye by reason of lime or some other substance flying into his eye from the apparatus at which he was working. This was called an adamant mixer, and consisted of a hopper set in the floor and

tive condition of the expander could not have been discovered by visual inspection, and that, although a machinist familiar with the working of iron, and the ordinary use of steel tools, he never in his previous experience had observed a piece to break from them, or a flash, followed by a flying spark of steel, upon their being struck, when in use, with a hammer, until the accident. In entering into the defendants' employment, he moreover had the right to rely upon the assumption that reasonably safe appliances would be provided, and to what extent, if at all, his previous general knowledge and the appearance of the expander should have led him as an ordinarily prudent man to test the hardness of its head before using it, was a question of fact for the jury. If the plaintiff assumed the risk of dangers incident to the business, he did not as matter of law assume risks of which it could have been found he neither had any knowledge, nor any reasonable cause, to anticipate. *Jellow v. Fore River Shipbuilding Co., ubi supra.* We are accordingly of opinion that the case should have been submitted to the jury under appropriate instructions. *Exceptions sustained."*

Struck by mallet. — In *KARLSON v. CITY OF BROCKTON, (Massachusetts, May, 1909)* 88 N. E. 901, it appeared that plaintiff's intestate, an

employee of defendant, was working for defendant with one Scott in driving a stake into the ground. Intestate was holding the stake and Scott was wielding the maul or mallet, driving it home. The maul had an iron band near the end of the head. Intestate looked around at a team driven near by. Intestate's head was about three or four inches from the top of the stake, and it was grazed by the iron ring on the maul as Scott swung it onto the top of the stake. After striking a glancing blow on intestate's head, the maul struck the stake squarely. Intestate was picked up, his injury appeared to be slight, but the brain was injured, and he died as a result of the injury. In the Superior Court, Plymouth county, a verdict was directed for defendant, and plaintiff excepted. *Exceptions overruled*, there being no evidence that the injury was caused by negligence of defendant. Opinion by LORING, J.

Metal from sledge hammer. — In *HOUSTON & TEXAS CENTRAL R. R. Co. v. MALLOY, (Texas Civil Appeals, March, 1909)* 118 S. W. 721, judgment for plaintiff for \$6,000 in the District Court, Harris county, in action for injuries caused by a piece of metal flying into his eye while using a sledge hammer in defendant's work, was affirmed. The facts are stated in the opinion rendered by McMEANS, J., as follows:

communicating with a mixing box below which contained the mixing machinery. Plaintiff's task was to place the ingredients of the wall plaster in the hopper, and, at a signal by bell from the floor below, turn the wheel, which opened two long and narrow trapdoors in the hopper and let the gauge, as it was called, down into the mixing box, and when the trapdoors would be closed and a fresh gauge made ready in the hopper for the next signal. The top of the hopper was

"The evidence justifies the following conclusions of fact: Plaintiff was about thirty years old, and had worked several years in railroad shops, and was an expert boiler maker, and was employed in that capacity in defendant's railroad shops in Houston. In November, 1905, several days before his injury, he had been sent by his foreman, at Houston, to Austin, to make certain repairs upon boilers of locomotives there, and directed to report to one Glass, the defendant's foreman at Austin, upon his arrival. This he did, and was put to work by Glass upon the boilers he was sent to repair, and continuously engaged in this work up to the 28th of November, 1905, when the foreman, Glass, sent him to assist in trying to force into position one of the driving wheels of a locomotive that had moved a little out of line on the axle. The axle, when originally made, is turned or rounded by means of a lathe, the axle being held by appliances at each end in holes called 'lathe holes,' that are afterwards filled with lead or babbitt metal, which conceals the hole and makes the end of the axle smooth, and gives it the appearance, after it is painted, of being solid. Plaintiff knew that lathe holes were in the ends of all such axles, and that some of these holes were filled with lead or babbitt metal, but at the time in question he did not think of it. When he reached the

engine he found the foreman and some of his machinists striking the end of the axle, and was told by the foreman to strike with the hammer on a piece of iron which was held against the end of the axle; but this he declined to do, for fear that the iron, being brittle, would break under the force of his blows, and that flying particles might injure himself or some of the others present, and, to demonstrate the reasonableness of his fear, struck the iron a light blow which broke it. The iron was then removed, and plaintiff was directed by the foreman to strike on the naked end of the axle, which he did, without the hoped-for result. Plaintiff then suggested the use of a ram, and one was constructed; but the piece of iron used as a ram was too light to answer the purpose, and this method was abandoned. The foreman again directed plaintiff to strike the end of the axle with the hammer, and although the latter protested that his efforts would be futile, because the driving wheels were placed on the axles by hydraulic pressure of 40,000 or 50,000 pounds and could not be moved by the method employed by the foreman, he, in compliance with the orders of the foreman, again began striking the naked end of the axle, and on delivering the last blow a piece of lead or babbitt metal, with which the lathe hole was filled, spurted out, striking plaintiff in the eye

open, and about six inches above the floor, and the claim of the plaintiff was that the employer had permitted the apparatus to get out of order so that, where as ordinarily the dust and fragments of lime and other ingredients of the gauge would fly up only about as high as the top of the hopper, when the trapdoors were opened, on the day of the accident they flew up three or four feet, and finally a piece or pieces of lime flew into plaintiff's eye and destroyed its

with such force as to destroy the sight and to require the removal of the eye. The work which plaintiff was called upon to perform was work usually done by machinists and their helpers, and not by boiler makers, but the work in question was not such as required any special skill further than to strike with reasonable accuracy a heavy blow with a sledge hammer. It was not infrequently the case that boiler makers would be directed by their superiors to do certain kinds of work usually performed by machinists where no special skill was required, and, when called upon by the proper authorities to do such work, were required to obey. Had plaintiff thought about it, he would have known that the soft metal was in the lathe hole; but he had never worked with that character of metal, nor had he ever done that character of work before, nor had he seen it done, and did not know that the metal was likely to fly out under the force of the blows. The foreman did know this, however, although he did not think of it at the time; and the uncontradicted evidence is that such blows delivered on the face of the axle frequently caused the soft metal to spurt out with such force as to injure persons near by, and that this was known to machinists generally. Plaintiff was unaware of this danger, and the foreman did not warn him nor did he take

any precaution against plaintiff being injured by the flying out of the metal. It was shown that the reason the metal flew out was because plaintiff, although directed to strike as near the centre of the face of the axle as possible, did not strike truly, so that the face of the hammer did not entirely cover the soft metal in the lathe hole and thereby prevent the spurting out of the metal, but that with a hammer weighing eighteen to twenty pounds it is impossible to strike in the same place every time. The end of the axle had been painted, and the lead or babbitt metal was not visible prior to the blow that caused a part of it to fly out and injure plaintiff.

"Under these facts we conclude that the plaintiff was not guilty of contributory negligence in striking upon the axle under the circumstances, nor was his injury the result of a risk assumed by him, but was due to the negligence of defendant in failing to warn plaintiff of a latent danger of which the plaintiff did not know, but of which the defendant knew, or in the exercise of ordinary care should have known." * * *

Chip or sliver from chisel.—*VANDERPOOL v. PARTRIDGE*, (*Nebraska*, 1907) 112 N. W. 318, was an action by plaintiff to recover damages for an injury resulting in the loss of his left eye while in defendant's employ. Plaintiff alleged in his

sight. Plaintiff ascribed the accident to the fact that a strip of leather belting that had been fastened to the inside of the hopper at the edge of its opening leading into the mixing box, and which, as he claimed, had prevented the particles from flying too high when the trapdoors were opened, had been allowed to become partially detached, and hung down at one end, permitting the escape of the ingredients upward through the opened trapdoor when churned about by the machinery in the mixing box. On the part of defendant it was denied that the leather was intended for any such purpose, or

petition that while he was employed by defendant in cutting holes for the support of a joist in a brick wall of a building, and while using a two-pound steel hammer and a chisel made from an old rasp, a chip or sliver from the end of the rasp flew off and struck him in the left eye, and so injured it that it had to be removed. Plaintiff alleged that defendant carelessly and negligently ordered and directed him to perform work outside of his usual and customary employment; that defendant failed and neglected to give plaintiff proper instructions for the performance of the work; that defendant negligently furnished an old rasp made into a chisel on which there was no wooden handle or top to prevent the same from chipping off. Defendant in his answer admitted the injury resulting in the loss of the eye and the employment of plaintiff, denied all the other allegations of the petition and pleaded negligence and assumption of risk by the appellant. At the close of evidence the trial court, upon motion of defendant, directed a verdict in his favor upon the ground that, under the pleadings and the evidence, plaintiff was not entitled to recover. On appeal, the Supreme Court reviewed the facts and held that plaintiff assumed the risk, and *affirmed* the

judgment of the District Court, Douglas county, in favor of defendant.

Molten Metal.—In *NEELY v. ORLEANS METAL BED CO.*, (*Louisiana*, May, 1909) 49 So. Rep. 700, it appeared that plaintiff, while engaged in pouring molten metal iron into a "chill" or mold, lost one of his eyes by reason of the metal having been blown out of the chill through the gate hole. On the trial in the Civil District Court, Parish of Orleans, he recovered judgment, but on appeal, this was *reversed* and judgment ordered for defendant, on the ground that plaintiff failed to prove, with reasonable certainty, that the injuries were attributable to the master's fault. Opinion by MONROE, J.

Molten Metal.—In *BROOKS v. KINSLEY IRON & MACHINE CO.*, (*Massachusetts*, May, 1909) 88 N. E. 771, plaintiff's exceptions to verdict for defendant in the Superior Court, Norfolk county, were *sustained*. SHELTON, J., said: "The fundamental question is whether there was evidence which would have warranted the jury in finding that the explosion by which the plaintiff was injured was due to an accumulation of rust or moisture in the pig bed into which the plaintiff was pouring molten iron, and that such accumulation was due to the negligence of the defendant or of some one for whose negligence the de-

did or could have any such effect as to protect the operator; but this was properly treated by the court as a jury question.

It appeared on plaintiff's case: That on the day of the accident, soon after he began work in the morning, he noticed that the material flew up higher than usual, and on examination discovered that the leather was loose; that he went and reported that fact to the superintendent, who told him to go ahead with the machine, that he would have it looked after; that plaintiff accordingly resumed work, and in the afternoon the accident took place. Another witness testified that he heard plaintiff tell the superintendent that "the mill was out

ferendat was responsible. There was ample evidence that such an accumulation in the pig bed might cause an explosion like what did occur. There was also evidence that for many years, up to a short time before the happening of this explosion, care had been taken to keep the beds free from rust or moisture by taking out the iron each morning, placing them upside down upon two iron rails until they were needed for use, and rubbing any spot of rust with a black oil which was provided for that purpose, but that for a few weeks or months before the explosion this practice had been abandoned; that the care of these beds had been intrusted to a new and inexperienced employee, to whom no instructions were given, and who formed the habit of taking out the iron each morning and putting the beds upon the bare ground without any other attention. He was never, in any way, according to the evidence put in by the plaintiff, instructed to look for rust or moisture in them, or to take any precautions against its gathering. This change of practice was followed by an increased number of small but harmless explosions; and there was evidence that such an accumulation of rust or moisture as would create danger of a violent

explosion, while it was not obvious to the molder, whose duty it would be to pour molten iron into the bed, could readily be discovered by proper inspection made beforehand. It also could be found that the plaintiff and the other molders were not charged with the duty of making such inspection, but were expected to use the beds as they found them, and that they had a right to rely upon proper care having been taken to keep them free from rust or moisture. On the other hand there was no direct evidence of the presence of rust or moisture in the bed, at or before the time of the explosion. The plaintiff testified that molten iron would fly in small particles, if it struck any hard substance like the ground, or still worse, upon a board, although this would not do more than burn the clothing; that an explosion was liable to occur at any time if a vat or pig bed was not properly kept. Other witnesses testified to the same effect. But there was no evidence that such an explosion as was testified to could have been produced from any other cause than an accumulation of rust or moisture. Accordingly, we are of opinion that the jury might have found that the explosion was due to such an accumulation." * * *

of order," and that the superintendent made the reply already quoted. On cross-examination plaintiff testified, in part: "Q. You were afraid you would get some in your eyes? A. I noticed to see what the trouble was. I didn't know whether I would get it in my eyes or not. Q. You were afraid you might get it in your eyes? A. I didn't know what would happen, but I noticed the machine was out of order. Q. If you had been afraid of getting it in your eyes, would you have reported it to Mr. Dey? A. No, sir. * * * Q. You were afraid if the box was not fixed it would come up so high that some of it would get into your eyes, and that is what did happen? A. Yes." The verdict for the defendant was directed upon four grounds, which were specifically stated by the trial court as follows: First. The plaintiff should make a case which conforms to the pleadings. He has not done that in this case. Second. There is nothing in this case to show any duty on the part of the defendant company, owing to this plaintiff, to make any repair of this slip for him, and consequently, there being no duty to be neglected, there can be no negligence in the case. Third. The notice that was given to Mr. Dey by the plaintiff, if any was given, was not a notice in the nature of a complaint which the plaintiff had any right to make and demand a performance of as a condition precedent or inducement of his remaining in the employ any longer, and consequently Mr. Dey had the right to consider that he was simply informing him of a defective condition which he had noticed, and which the correct working of the machine, in the interest of the company, made necessary to be praised. Fourth. That while it is true that if there were in this case a duty owing by the defendant to the plaintiff, which duty was neglected in that they permitted the machine to become out of repair, and that the plaintiff complained of that duty to the company, and that the company promised to repair, still it is clear from the evidence in this case that the plaintiff continued in the face of an imminent danger which no reasonable person would have remained to incur. To this ruling an exception was duly sealed and is assigned for error.

As to the first ground, the alleged variance did not exist. The declaration set out the fact of plaintiff's employment, a description of the apparatus, the duty of defendant to use due care that it should be in good order and to prevent its contents being thrown out, and a negligent failure in the performance of that duty whereby plaintiff was injured. This was entirely adequate to support the proof. If the trial court had in mind the additional facts that plaintiff was aware of the defect, complained of it, and that there was an unful-

filled promise to repair, as constituting a variance, or, rather, a failure fully to state the cause of action, the answer is that no such full statement was required. Plaintiff's knowledge of the danger would create an assumption of the risk unless avoided by a promise to repair; but assumption of risk, like contributory negligence, is a defense, and need not be confessed and avoided in the declaration. If by promise to repair the assumption of risk was in fact negatived, the right of action still remained unimpaired, on the original liability of the master for negligence in failing to use due care to have the machine reasonably safe. *Belleville Stone Co. v. Mooney*, 60 N. J. Law, 323, 38 Atl. 835 (10 Am. Neg. Rep. 216ⁿ); *Thorpe v. Mo. Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3. As was said in *Dunkerley v. Webenderfer Machine Co.*, 71 N. J. L. (30), 60, 58 Atl. 94, 16 Am. Neg. Rep. 503 (71 N. J. Law, at page 62, 58 Atl., at page 95, 16 Am. Neg. Rep., at page 509): "The view which we take does not rest the right of recovery upon the promise, but upon the master's negligence, and the fact that the application of the principle expressed in the maxim *volenti non fit injuria* is negatived by the servant's reliance upon the promise." The point was not even argued or briefed for defendant in error.

The fourth ground may be disposed of in a word, and is therefore taken up out of its order. It is enough to say that whether the danger was so imminent as that plaintiff, notwithstanding a promise to repair, ought not to have continued at work, and was guilty of contributory negligence in so doing, was, on the evidence, clearly a jury question, and, as we view the testimony, might well have been resolved in favor of the plaintiff. See *Dowd v. Erie R. R.*, 70 N. J. Law, 451, 457, 57 Atl. 248, 16 Am. Neg. Rep. 122.

The second and third grounds may conveniently be considered together. The second is, generally, that no duty of the master to make any repair of the machine was shown, and, so far as not included in the third, would seem to imply that there was no evidence of any dangerous defect in the machine. It is sufficient to say that our examination of the testimony satisfies us that there was such evidence. The plaintiff and several other witnesses all testified that the dust and fragments were that day flying much higher than usual, and that this was due to the partial detachment of the leather strip. A jury question was therefore clearly raised.

The other phase of the second ground is included in the third, and amounts to this: That conceding a defect in the machine fraught with danger to the operator, which condition ordinarily the master should have remedied, nevertheless such condition was obvious to

and actually observed by the plaintiff, and the risk therefore assumed by him, and that this assumption of risk was not negated by what he said to the superintendent, because there was nothing in what he said to indicate to the latter that plaintiff was complaining of a danger that he wished remedied for the sake of his own safety, but that plaintiff was simply calling his attention in the interest of the employer to a defective working of the machine, and a number of authorities are cited by defendant in error for the proposition that it must fairly appear that the notice of a defective condition apprised the master that the servant apprehended danger, in order to make the master's promise to repair effective as justifying the servant's reliance on it. The authorities cited on this point and others not cited have been examined with care, as the precise point does not seem to have been heretofore raised in this State. In *Cicalese v. Lehigh Valley R. R.*, 75 N. J. Law, 897, 69 Atl. 166, there was a loose handle bar on a hand car, and plaintiff's complaint was: "The handle is all loose. We can't work with this." The question whether the complaint was of such a character as to apprise the master of an apprehended danger was not raised at all; the reversal being put upon the ground that the complaint had not been made to any one having the requisite authority to repair or to promise repair. Of authorities that have denied a recovery to the injured servant, those cited to us, and those independently examined, resolve themselves into four classes, all distinguishable from the present case and dependent for their decision on the application of some other principle. They are: 1. Cases in which the appliance was not dangerous originally, and had not become so when the accident occurred. 2. Cases in which there was a complaint, but no promise to repair. 3. Cases in which recovery for negligence of the employer, if any, was barred by contributory negligence in working in the face of an imminent danger. 4. Cases in which the complaint was obviously of something else than of danger to the operator.

Of the first class are the cases of *Gowen v. Harley*, *Leonard v. Herrmann*, and *Higgins v. Fanning*. In *Gowen v. Harley*, 56 Fed. 973, 6 C. C. A. 190, plaintiff was injured while transferring a heavy box from one railroad car to another that stood alongside it and about five feet away, by dragging the box through the open side doors of both cars across the gap. He had asked for skids to make the work easier; but it affirmatively appeared that he never had considered the operation as dangerous. There was no appliance out of order and none to get out of order. The court held that the transfer was a simple act of manual labor, and that there was no primary

neglect of duty by the master. In *Leonard v. Herrmann*, 195 Pa. St. 222, 45 Atl. 723, 7 Am. Neg. Rep. 506, there was an elevator of a type in ordinary use and in perfect condition. Plaintiff claimed that he was injured because the master had failed to keep a promise to supply guards in response to plaintiff's request; but the court said that as there was no defect in the apparatus, and therefore, as no duty to supply guards existed in the first place, none was raised by the complaint and promise. A similar situation existed in *Higgins v. Fanning*, 195 Pa. St. 599, 46 Atl. 102, where plaintiff's hand was injured in a laundry mangle of a common type and, so far as the evidence showed, in good order, and the same ruling was made. From these three cases therefore we deduce the rule that if no condition exists that is so unsafe as to require the master, in the exercise of ordinary care, to remedy it, a promise to make the actual condition safer will not support an action for damages for injury occurring after the making of such promise, though it be not performed; but that rule is not applicable to the present case.

Coming now to the second class, the case of *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596, 55 S. W. 362, turned on the point that no promise was made. So, also, did *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 16 Am. Neg. Cas. 525, 39 Pac. 85, in which plaintiff complained of a defective hand car and said he was afraid it would kill somebody, and the foreman said: "Get on the car. It is all right. We will soon get a new one." There may be some doubt of the correctness of the court's ruling that this was a promise; but the case was doubtless properly decided on the additional point of contributory negligence, and in this aspect falls into the third class. So also does *Thorpe v. Mo. Pac. R. Co.*, 89 Mo. 650, 2 S. W. 3, 16 Am. Neg. Cas. 506, in which there was a complaint of an insufficient number of men to do the work, but no promise to supply them. The case was treated wholly on the lines of contributory negligence and a recovery by plaintiff sustained. The case is of no particular value in the present inquiry, except that one of the headnotes may be worth quoting: "There is no waiver by a servant of his objection to such a defect if there has been any notice given by him, however timid and hesitating, so long as it plainly conveys to the master the idea that a defect exists and that the servant desires its removal." In *Gulf, Col. & S. F. R. R. v. Donnelly*, 70 Tex. 371, 8 S. W. 52, a recovery was upheld on the theory that though plaintiff complained of a defective condition of the railroad roadbed, and there was either no promise to repair it, or an unreasonable delay in performance, the condition was not one of ob-

vious danger to himself while using a hand car, but to heavy trains drawn by locomotives for whose safety he feared. There was consequently no inference of assumed risk to be negated.

Lastly, as to the fourth class: From the cases of *Tesmer v. Boehm*, 58 Ill. App. 609, 14 Am. Neg. Cas. 332, in which the master was notified that repairs would be needed to get good work on the machine, and *Chicago Bridge Co. v. Hays*, 91 Ill. App. 269, where the complaint was of inconvenience in operation, the proposition is deduced by Mr. Labatt that "the general rules as to the effect of a promise (to repair, etc.), has no application to a case where neither the master nor the servant contemplated any additional danger to the servant in the use of the defective instrument, but only imperfections in the work done with it." Labatt, *Master & Servant*, § 422, note 5. This was the principle applied in *Balle v. Detroit Leather Co.*, 73 Mich. 158, 16 Am. Neg. Cas. 57, 41 N. W. 216, where the death of plaintiff's intestate resulted from the position of a box around which he had worked for six weeks and complained of only as being in his way. So, also, in *International R. Co. v. Turner*, 3 Tex. Civ. App. 487, 23 S. W. 146, where the complaint was by the foreman of the slowness of making up trains in a freight yard, and the deceased said it could be done faster if another man were supplied, and was afterward killed because the extra man was not supplied.

But if we accept this as correctly stating the law, the present case is still not within it, because, in the cases cited, not only did plaintiff fail to show that the complaint was predicated on any anticipated danger to himself, but it affirmatively appeared that the question raised was one of personal convenience to the employee or more efficient performance of the work. The case of *Lewis v. N. Y. & N. E. R. Co.*, 153 Mass. 73, 15 Am. Neg. Cas. 493, 26 N. E. 431, relied on by defendant in error, shows clearly a condition, not for his own safety, but for his master's pocket. In that case plaintiff had been for a long time familiar with the rotten condition of planking on a pier where his duties required him to go, and which was to some extent used by the public. He had reported this condition a number of times, and said that "somebody would get hurt yet," and promise of repair had been made. A reading of the testimony quoted in the opinion, however, supports the conclusion of the court that the complaint was manifestly made as bearing on the safety of the public and to protect the employer from damage suits, and not for the purpose of securing safety to the servant. This conclusion is fortified by the fact that the condition had been forming for a long

time by gradual decay, and was not, as in the case at bar, the sudden and unexpected imperfection of a piece of machinery. *Lewis v. N. Y. & N. E. R. Co.*, *supra*, is the authority relied on in *Bodwell v. Nashua Mfg. Co.*, 70 N. H. 390, 47 Atl. 613, where the facts were that plaintiff's view was obstructed by escaping steam so that he caught his foot in a pile of planks and injured himself. He had complained, a week before, of the steam, and there had been a promise to correct it; but the point in the case seems to be that at the time of the complaint there was no danger from the planks, as they were not piled there at all until the very day of the accident, and it is obvious that neither master nor servant at the time of the complaint and promise could have had in mind any such danger resulting from the steam. *Burlington & Col. R. Co. v. Liehe*, 17 Colo. 280, 13 Am. Neg. Cas. 547, 29 Pac. 175, was another hand car case. Plaintiff had known of a defective rod for two months, and, as the court read the testimony, had complained generally that the car was in bad condition, and that the section foreman had promised to remedy that condition; but the court was unable to find any testimony that any specific complaint was made about the rod, and held that plaintiff should have pointed out the defect with more particularity, citing *Beach*, Contrib. Neg., § 372, and *Crutchfield v. Railroad*, 75 N. C. 320. *Hough v. T. & P. R. Co.*, 100 U. S. 213, is a leading case. A locomotive engineer was scalded to death by escaping steam and water from his upset engine. The steam and water escaped because the whistle was insecurely attached to the boiler and broke off when the engine upset. The upsetting was caused by colliding with an animal on the track when the pilot of the engine was out of order. Deceased knew of the defective pilot, had complained of it, and there had been a promise to repair. The court sustained a verdict for plaintiff. It does not appear in the report whether the complaint was based on any danger apprehended by the servant. The opinion in *Rothenberger v. N. W. Consol. Milling Co.*, 57 Minn. 461, 59 N. W. 531 (16 Am. Neg. Cas. 177), distinguishes *Lewis v. N. Y. & N. E. R. Co.*, 153 Mass. 73, 15 Am. Neg. Cas. 493, 26 N. E. 431, as a case in which the conclusion from the evidence was inevitable that the complaint was not based on any apprehension for the personal safety of the servant, and in effect puts on the master, in case of a complaint, the burden of showing that it did not relate to the servant's safety. "According to the best considered cases," says the court, "the real question to be determined is whether, under all the circumstances as they appear in each case, the master had a right to believe that the servant intended to waive his objection to the defect

of which he complained. This is a question of fact, and not of law, and consequently for the jury, at least if not entirely free from doubt."

No two cases are exactly alike, and it is always difficult to formulate a general rule applicable to all. It is worthy of note, however, that in most, if not all, of the cases examined above in which the defective condition existed, it had been one of long standing before the complaint was made, and this, in connection with other facts, led to the conclusion that the complaint was not a complaint of dangerous conditions. Counsel cited Labatt on Master and Servant, p. 1191, as authority for the proposition that the burden is on the plaintiff to show that the complaint and promise related to the servant's safety, quoting as follows: "A promise cannot be regarded as the inducing motive of a servant's continuance at work unless it appears that the immediate purpose of the stipulated alterations was to secure more effectually his personal safety." Examination of the text shows that the first part of the sentence is omitted. It begins: "Several decisions are based upon the principle that a promise cannot," etc. Apparently the learned author did not care to commit himself to the proposition contended for. We also are unwilling to go to any such length. The master when employing the servant to work on a machine holds out to him that due care has been used to make the machine reasonably safe for his use, and the law requires that due care will be used to keep it so. If, while the servant is at work, the machine shows signs of being out of order, the status of the parties at once changes, and when the servant on discovery of the defect in the machine reports it to the master, without more, we think this may properly be regarded by a jury as tantamount to a notification that conditions have changed, and that the servant looks to the master to ascertain whether there is any danger, and, if so, to guard against it before requiring the servant to proceed with the work. If the master promises to repair, the servant is entitled under such circumstances to consider that promise as negating any assumption of risk on his part. The failure of the master to inspect at once does not prejudice the servant, for presumably the master is familiar with the machine and may not need to inspect it. Such were the facts that the jury might have found in the case at bar, and on those facts it was for the jury to say whether the notice to Mr. Dey as representative of the master was, or should have been, understood by Dey as a complaint of a dangerous condition, and whether the plaintiff was entitled to regard the alleged promise to repair as based on that complaint.

In our view of this record, the case was one for the jury on all the points stated by the court and counsel, and we perceive no other ground for sustaining the direction of a verdict.

Let the judgment be reversed, and a *venire de novo* be awarded.

WENDELL v. LEO.

Court of Appeals, New York, March, 1909.

MASTER AND SERVANT—ELEVATOR IN STORE—USE BY EMPLOYEES—ABSENCE OF REGULAR ATTENDANT.—

Where plaintiff, an employee in defendant's store, who was injured by falling into an elevator well, alleged negligence on the part of defendant in permitting the elevator boy to temporarily leave the elevator as he had been accustomed to do to perform other duties in the building, it was *held* that defendant was not bound as against an employee to furnish at all times or at any time a regular attendant to run the elevator or to prohibit other employees from running it, and was not negligent because he imposed on the elevator boy other duties which occasionally took him away from the elevator.

EMPLOYEE FALLING INTO ELEVATOR WELL—DEFECTIVE

LATCH—EVIDENCE.—Where plaintiff, an employee in defendant's store, who was injured by falling into an elevator well, alleged the defective condition of the latch of the elevator door which, failing to catch, permitted the door, if closed with sufficient force, to rebound and stand open, and called as a witness the employee who it was claimed left the door open, and such witness testified explicitly and unqualifiedly that he closed the door after using the elevator but could not tell whether it latched, the testimony of such witness must be regarded as credible, although plaintiff was not prevented from showing by other evidence that the door did open when the witness pulled it shut, and the evidence of such witness must be accepted as controlling, unless there is other evidence from which the jury could find the fact to be otherwise. *Held*, that the evidence was insufficient to show that a defective latch was cause of accident, and judgment for plaintiff was reversed (1).

APPEAL from Supreme Court, Appellate Division, Fourth Department.

1. See Notes of "Elevator Cases" reported at the end of the case at bar.

See also AMERICAN NEGLIGENCE DIGEST (1909 edition), title "Ele-

vators," which collates the "Elevator Cases" reported in Vols. 1-20 AM. NEG. REP., from 1897 to 1907.

ACTION by Margaret Wendell against Michael J. Leo. An order and judgment in favor of plaintiff was affirmed by the Appellate Division (123 App. Div. 912, 108 N. Y. Supp. 1150), and defendant appeals. *Judgment reversed.*

"The action was brought to recover damages for injuries caused to the respondent by falling into an elevator well on the premises of the appellant, in whose employ she was at the time. Taking that view of the evidence which is most favorable to her, we may regard the following material facts as established: Appellant was the owner and occupant of a building of several floors used for the purpose of a store. There was an elevator running between the different floors, which, under ordinary circumstances, was operated by a boy. This boy was also accustomed at times temporarily to leave the elevator and distribute parcels throughout the store. The latch of the elevator door was defective, so that at times it would not catch, and, if the door was shut with sufficient force and did not catch, it would rebound several inches. After it became stationary on such rebound, it would not of its own motion either close or open further. On the occasion in question the elevator boy, having brought the elevator to the lower floor, left it temporarily to distribute some packages; the door being closed within two or three inches. While he was away, the appellant's manager, one Kelling, took the elevator for the purpose of going to another floor. Being called by respondent, he testified that as he moved away he closed the elevator door, but could not say whether it was latched. Some time after, the respondent, having occasion in the course of her employment to go to an upper story, approached the elevator, and, finding the door open in the neighborhood of eighteen inches, stepped, as she supposed, into the elevator, but owing to its absence, fell several feet, and was injured. There was no evidence showing definitely how long a time had elapsed between the taking of the elevator by appellant's manager and the accident of the respondent, although the elevator boy testified that he had left the elevator only a short time before the accident. Neither was there any evidence showing that any person had or had not opened the door after the elevator was taken away by Kelling. The trial judge charged the jury that, if the respondent herself pushed the door open, she could not recover."

MAULSBY KIMBALL, for appellant.

W. B. SIMSON, for respondent.

HISCOCK, J. (after stating the facts as above.) — While the trial judge did not specifically define to the jury the questions on which

they were to pass, apparently he intended to permit them to find the appellant negligent upon one or both of two theories.

The first of these was that the appellant was guilty of negligence in permitting his elevator boy temporarily to leave the elevator as he was accustomed to and as he had done on the occasion of the accident for the purpose of delivering parcels throughout the store. The second one was predicated on the defective condition of the latch of the elevator door, which, failing to catch, permitted the door, if closed with sufficient force, to rebound and thus to stand open. We are entirely unable to see how the temporary absence of the elevator boy became the proximate cause of respondent's accident. He left the door in a safe condition when he went away, and, on respondent's theory, it was only placed in an unsafe position by the subsequent use of the elevator by appellant's manager. The appellant was not bound as against an employee to furnish at all times or at any time a regular attendant to run the elevator, or to prohibit other employees from using it, if competent, and there has been no question of the competency of the manager to operate it. This being so, the employer was not negligent simply because he imposed on the elevator boy other duties which occasionally took him away from the elevator. Furthermore, the absence of the boy was not, in any sense, the proximate cause of respondent's accident. The door through which she fell was left open in the use of the elevator after the boy departed, either because the latch failed to catch or because the manager carelessly did not close it, or because some other person unwarrantably interfered with it. In either case the mere absence of the boy did not legally or proximately become the cause of respondent's accident. If the trouble was with the defective latch, the appellant's liability is entirely independent of the boy's absence or presence, and certainly the latter's absence did not in any legal sense justify the manager in being careless, or another person in interfering with the elevator, if either of these things occurred. It is thus perfectly apparent that between the boy's departure and the accident some entirely independent cause intervened to produce the latter, and it was error to submit this question to the jury.

We next come to the question of the defective latch. Respondent was entitled to go to the jury on that theory of negligence, provided her evidence permitted the jury to find that the latch did cause or contribute to her accident. We do not think, however, that the evidence as now submitted to us tended to establish the necessary connection between the latch and the open elevator door which caused

her fall. The employee under whose operation it is claimed the door was left open was called as a witness by the respondent herself. He testified explicitly and unqualifiedly that he closed the door, but could not tell whether it latched. This witness is the only one who speaks upon this specific point, and having been called by the respondent, he must be regarded as credible, although this would not prevent the respondent from showing, if possible, by other testimony that the door did open after he pushed it shut. But, having been called by her, his evidence must be accepted as controlling, unless there is other evidence from which the jury could find the fact to be otherwise than as testified to by him. The specific question, therefore, arises whether there is any evidence from which a jury might be permitted to conclude that, after this witness closed the door as stated by him, it rebounded and opened eighteen inches as the result of the defective latch, because the respondent must rely at this point upon the defective latch. If the employee negligently left the door open independent of the latch she cannot recover on any theory now presented to us.

We think there is no evidence which would permit a jury thus to conclude. Some time — it does not appear just how long — after this employee says he closed the door, respondent swears she found it open. While, as stated by the trial judge, there is no evidence to show that some one else had opened it in the meantime, there is, on the contrary, no testimony which so excludes the possibility of such act that the jury could say that its open condition at the later time contradicts the fact testified to by Kelling that he left it closed. Thus no different versions are permitted about the conditions which followed Kelling's use of the elevator, and the respondent is bound by the latter's testimony. In view of the entire testimony of this witness the further question might arise, even if we were permitted to say that the elevator door stood open eighteen inches in consequence of Kelling's use, whether it would be other than speculative to say that such open condition was due to the defective latch rather than to his failure to shut it or to some other cause, but we refrain from discussing that question as it is not now before us.

Various other objections and exceptions were argued which it is unnecessary to consider in view of our conclusions upon the points discussed.

The judgment appealed from must be reversed with costs, and a new trial granted.

CULLEN, CH. J., and GRAY, EDWARD T. BARTLETT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

NOTES OF ELEVATOR CASES.

Elevators in Stores.

Fall of elevator in store — Passenger injured — Storekeeper liable.

In *STEISKAL v. MARSHALL FIELD & Co.*, (*Illinois Supreme*, December, 1908) 87 N. E. 117, appeal from judgment of the Appellate Court, First District, affirming a judgment for \$10,000 for plaintiff in the Circuit Court, Cook county, in an action for damages for injuries alleged to have been sustained by the fall of an elevator in defendant's store, upon which plaintiff was riding, judgment for plaintiff was *affirmed*. The court (per HAND, J.), after holding that the declaration was sufficient to support the judgment, said:

"It is next contended that the facts proven do not establish that the relation of passenger and carrier existed between the parties at the time appellee was injured. The appellee testified: He went to the store of the appellant to obtain employment; that he inquired of an employee of the defendant on the first floor for the superintendent; that he was told the superintendent was on the ninth floor and was directed to take the elevator to that floor; that he got off the elevator at the ninth floor and inquired for the superintendent and was informed that he was not in his office; that he returned to the elevator, the door of which was open, and entered the elevator; that the operator closed the door behind him and turned on the power, and the elevator immediately dropped to the basement floor; that the elevator was wrecked, the operator killed, and he was severely injured. We think this evidence fairly tended to show that the appellee was rightfully in the elevator, and that the relation of passenger and carrier existed between the parties at the time the appellee was injured. In an establishment like that of the appellant there is a general invitation to persons to enter who have business with the appellant. The appellant employs a large number of persons, and it was clearly lawful for the appellee to enter its store for the purpose of seeking employment, and upon being directed to the office of the superintendent and invited to use the elevator in going to his office he clearly was rightfully upon the elevator, and upon finding the superintendent out of his office he had the right to return to the first or main floor in the elevator. There was, at least, evidence introduced by the plaintiff fairly tending to show that the relation of passenger and carrier existed between the parties at the time the elevator fell, and that the appellee was rightfully upon the elevator; and as those questions were questions of fact, or, at most, of mixed law and fact (*Springer v. Ford*, 189 Ill. 430, 59 N. E. 953, 19 Am. Neg. Rep. 179), we think it cannot now, in view of the holding of the trial and Appellate Courts, be successfully contended in this court, as a matter of law, that such relation did not exist, or that the appellee was wrongfully upon the elevator, at the time it fell. This case is not like that of *Walsh v. Cullen*, 235 Ill. 91, 85 N. E. 223. In that case the relation of master and servant existed between the parties, while here the appellee was a passenger, and the duty which the appellant owed the appellee was the duty growing out of the relation of carrier and passenger. This court has held (*Hartford Deposit Co. v. Sollitt*, 172 Ill.

222, 50 N. E. 178, 4 Am. Neg. Rep. 263, and *Springer v. Ford*, *supra*) that a person operating a passenger elevator, under the circumstances under which the elevator in question was operated at the time of the accident, is a carrier of persons, and bound to exercise a high degree of care in transporting passengers, and that the fact that the elevator falls when persons are being carried thereon is evidence that the elevator was mismanaged, or was out of repair, or of faulty construction." * * *

A dissenting opinion was rendered by DUNN, J., in which CARTWRIGHT, C. J., and SCOTT, J., concurred.

Rehearing denied, February 10, 1909.

Falling down elevator shaft in store—Patron injured—Storekeeper liable.

In *EILERMAN ET AL. v. FARMER*, (*Kentucky*, April, 1909) 118 S. W. 289, appeal from judgment for plaintiff for \$5,000 in an action in the Circuit Court, Campbell county, for damages for injuries sustained by falling down an elevator shaft in defendant's store, judgment was *affirmed*. The opinion was rendered by CLAY, C., who stated the facts as follows:

"The appellants conduct a wholesale and retail clothing business, occupying several floors of a building. The business is conducted mainly on the first floor. In the basement of the store there were some dry goods boxes which appellants usually disposed of by wholesale, but which they sometimes sold by retail as a matter of accommodation. Appellee, desiring to purchase some of these boxes, went to appellants' store on the occasion of his injury. Appellee was a man sixty-eight years of age, and was accompanied by his grandson, a boy thirteen years of age. He asked an employee of appellants, who was standing on the sidewalk near the entrance, if they had any boxes for sale, and was told to go inside. On entering the store, he inquired of one of the clerks about the boxes, and was referred to Michael Winstel, another clerk. According to the testimony of appellee, the latter told Winstel that he wanted to get some boxes, and Winstel said, 'All right, kept them in the cellar,' at the same time directing them to take the elevator. According to the testimony of Winstel, he, upon being informed of appellee's wishes, simply said to him, 'Step back.' Winstel then proceeded to the door of the elevator, followed at a distance of from three to fifteen feet (variously estimated by different witnesses) by appellee and his grandson. The elevator in use in the store was for the accommodation of both freight and passengers. No particular man was in charge of the elevator. It was operated by such clerks as had occasion to use it. In order to operate the elevator, it was necessary for one to open the gate of the shaft, reach in, and take hold of the ropes controlling the elevator. It was the custom of the clerks, when the elevator was not at the floor where were located the parties who intended to use it, to open the door of the shaft and first shake the control ropes in order to warn any one that might be on the elevator at another floor, and then, by a pull of the control ropes, bring it to the desired position. When Winstel reached the elevator, he opened the door of the shaft. At this point the evidence is very conflicting. According to the testimony of appellee and his grandson, Winstel, upon opening the gate, turned to appellee and beckoned him to step into

the elevator. When this was done, appellee passed through the gate, stepped into the opening, and fell to the cellar below. On the other hand, however, the testimony for appellants is to the effect that, when Winstel reached the shaft, he grasped the control ropes of the elevator, shook them to give warning to those above, and, having received the words 'All right' from the clerk above, pulled the ropes for the purpose of causing the elevator to descend; that while standing there, with his back toward appellee, watching the descent of the elevator and retaining his grasp upon the two ropes with both hands in order to check the elevator when it should arrive at the first floor, appellee stepped past him and fell into the elevator shaft."

The court, after disposing of the objections to several instructions and admission of a certain conversation, referred to the damages, and said:

"But it is insisted that the verdict is excessive. While appellee was sixty-eight years old at the time he was injured, it appears that he was a strong and vigorous man, and was a ship carpenter and caulker of fairly good skill. At the time of the accident, and for some time prior thereto, he was engaged as an expressman, and earned from eighteen to twenty dollars per week. Since the accident he has not been able to do work of any kind. Appellee suffered very severe pains up until the time of the trial, which took place about nine months after the accident. At the time of the trial he was still walking on crutches. He sustained an oblique fracture of the upper thigh bone, and his spinal column was bruised and injured. The injured limb is three inches shorter than the other, and two inches less in circumference. There can be no doubt that appellee's injuries are permanent. His physician's bill up to the time of the trial amounted to \$322. We cannot say that a verdict for \$5,000, for an injury which manifestly resulted in great physical and mental suffering, and which involves the permanent reduction of the strength of a broken leg, is so excessive as to make it appear that the jury were influenced in their action by passion or prejudice. *Maysville & Lexington R. R. Co. v. Herrick*, 13 Bush, 122."

Child injured by a moving stairway or escalador in department store — Attraction to children — Storekeeper liable.

In *HILLERBRAND v. MAY MERCANTILE CO.*, (*Missouri Appeals*, St. Louis, July, 1909) 121 S. W. 326, appeal from judgment for plaintiff, a young child, who was injured by a moving stairway or escalador in defendant's store, verdict for \$700 in the St. Louis Circuit Court being rendered, was *affirmed*. The facts are stated in the opinion rendered by GOODE, J., as follows:

"This action was instituted to recover damages for an injury to the plaintiff, a minor, suing by next friend. Defendant conducts a large retail department store, several stories high, in the city of St. Louis. One of the means provided for patrons to pass between the first and second floors is a moving stairway or escalador. This device consists of two flights of stairs of easy slope, extending parallel to each other from the first to the second floor, kept in motion by machinery, one ascending as the other descends, and transporting passengers from one floor to the other. The banisters or hand rails on either side of the stairs move as the stairs do, and are composed of a rubber casing around an endless

interior chain. On the first floor these hand rails and the endless chains they cover run into boxes some six or eight inches square, and projecting above the surface of the floor from six inches to a foot. Inside the boxes the chains and their rubber coverings run over sprocket wheels, and then up again to the second story. There is evidence to prove the top of one of these boxes was open at the time of the accident in question, and that the aperture was large enough for a grown person's two hands to be inserted. One day plaintiff, who was then a child three years old, was taken by her mother to defendant's establishment, and while the mother was engaged in making a purchase in close proximity to the foot of the descending stairway in some way plaintiff's right hand became inserted in the box into which a hand rail descended, was clamped by the hand rail, and gradually drawn farther into the opening, and before it could be extricated, her hand and arm was severely lacerated. No witness saw the child's hand get in the opening as attention was first directed to her plight by her screams. Some moments elapsed before the machinery could be stopped and her arm drawn out, and meanwhile the arm was pulled in farther as the rail continued to revolve. After describing the construction of the stairway, the petition alleges defendant knew, or by the exercise of ordinary care would have known, the public, including the child, might visit their store, and ride on the stairway, knew the stairs were alluring to children, and particularly that the opening in the box was likely to attract them, and induce them to put their hands in the hole where the rail was running; that nevertheless defendant carelessly failed to cover the opening and allowed it to remain unguarded; that the plaintiff's right hand was caught suddenly in said hole between the box and the bell used in propelling the stairway, and her hand was thereby torn and lacerated, causing her great and excruciating pain of both body and mind, and mangling her so she was crippled permanently." * * *

On the point as to whether due care was exercised by defendant to guard against injury to children on its premises, the court said:

"In our judgment common knowledge of the nature of children sufficed as evidence for the jury that due care was omitted in failing to cover the box. Some of the testimony tended to prove the aperture was a foot above the floor, and, if this was true, a small child would not have to stoop much to put its hand in the box. The gravamen of the petition is negligence in failing to screen or guard the opening, and it is immaterial whether plaintiff intentionally thrust her hand in the box or got it in accidentally, for she was too young to be guilty of contributory negligence. Proprietors of premises who invite children on them must use care to keep them reasonably safe, not omitting precautions against injury from childish impulses." * * * [Citing several cases on the duty of an owner to keep his premises reasonably safe for those invited thereon with special reference to the nature of children.]

The court held that the damages were not excessive. "Plaintiff's injury did not involve the bones or ligaments of her hand, but, though the laceration was superficial it was extensive, and caused severe pain for weeks, and so affected the hand as to change plaintiff from a normal right-handed girl into a left-hand one. Portions of the skin, or,

as one witness said, the flesh, had to be clipped away with scissors. She was under treatment by a physician for four weeks, and when her hand was dressed day after day, would scream so loudly from the pain as to be heard a block away. At the time of the trial she seemed to have but little use of the injured member, and handled articles with it awkwardly. She still acted as though it hurt her." * * *

Elevators in office buildings

Employee of tenant killed by falling into elevator shaft — Owner of building liable.

DEVINE v NATIONAL SAFE DEPOSIT CO., (*Illinois Supreme*, June, 1909) 88 N. E. 804, was an appeal by the National Safe Deposit Company from a judgment of the Appellate Court for the First District affirming a judgment for the sum of \$6,000 recovered by James Reddick, administrator of the estate of William Thomas Daly, deceased, against the appellant, in the Superior Court of Cook county, in an action on the case for damages on account of the death of said Daly, occasioned, as is claimed, by the negligence of the appellant. While the cause was pending in the Appellate Court, the death of James Reddick was suggested, and John F. Devine, having been appointed administrator *de bonis non* of said estate, was substituted as appellee.

The declaration, which contained but one count, charged that appellant on May 9, 1905, was the owner of a large office building in the city of Chicago which was occupied by its tenants for hire; that in the rear and outside of said building it had provided a platform which connected with a certain doorway leading into said building for the use of its tenants in conveying their goods to and from said building; that in said platform, close to said doorway, appellant had a certain large freight elevator shaft descending from that platform to a depth of eighteen feet, in which it operated an elevator from the surface of the platform to the basement of the building; and that the deceased, while in the employ of one of the tenants of appellant, engaged in conveying the goods of said tenant into said building over said platform, when in the exercise of ordinary care for his own safety, by reason of the negligent failure of appellant to guard the mouth of the elevator shaft at a time when the elevator was at the bottom of the shaft, fell into said shaft and was killed. Appellant interposed the general issue. At the close of the evidence offered by the plaintiff the defendant's motion for a peremptory instruction was denied. No evidence was offered on the part of defendant.

After stating the facts as shown by the evidence the court (per SCOTT, J.) said:

"There was no eyewitness to the accident. Appellant was guilty of negligence as charged. The evidence raises a presumption that Daly did not commit suicide. There was also proof from which the jury might infer that the deceased was in the exercise of due care for his personal safety at the time of the accident, unless, as contended by appellant, that inference is forbidden because Daly knew of the open and unguarded shaft, and knew of the danger connected therewith. This contention of appellant cannot be sustained. It cannot be said as a matter of law that

Daly was not in the exercise of due care for his personal safety when he received the injuries merely because he made use of the platform with full and complete knowledge of the danger. *City of Streator v. Chrisman*, 128 Ill. 215, 54 N. E. 997, and cases there cited; *Palmer v. Dearing*, 93 N. Y. 7; *Dewire v. Bailey*, 131 Mass. 169; *Hopkinson v. Knapp*, 92 Iowa, 328, 60 N. W. 653; 7 Am. & Eng. Ency. of Law, 332.

"Appellant concedes that the doctrine of assumed risk can have no application here; but insists that the fact that the deceased 'knew and appreciated the danger and voluntarily continued his work without objection' bars a recovery under the rule 'that he who consents cannot afterward complain.' Appellant's argument is in this regard merely an attempt to apply the doctrine of assumed risk and to give it another name."

Judgment affirmed.

Employee of tenant injured in elevator started by employee of another tenant.

In *McMANUS v. THING ET AL.*, (*Massachusetts*, May, 1909) 88 N. E. 442, plaintiff's exceptions to verdict rendered for defendant were *overruled*. [See former decision, 194 Mass. 362, 80 N. E. 487.] It appeared from the opinion rendered by MORTON, J., that:

"The parties were widely at issue as to the circumstances attending the accident, including the respective rights of the plaintiff and Redding to the use of the elevator at the time of the accident. The plaintiff testified in substance that the elevator was empty and that there was no one in it, and that he had loaded on to it a heavy crate which he was going to take to one of the upper floors, when Redding came onto the elevator, and, without saying anything to the plaintiff, started it, and the elevator caught the plaintiff's foot, causing the injury complained of. The plaintiff testified on cross-examination that, if any one (meaning one of the tenants or their employees) was in possession of the elevator and was using it, he had a right to keep it and to use it until he was through with it and no one had a right to interfere with him. Redding's testimony was, in substance, that he had loaded onto the elevator and taken down to the street level a number of cases of rubbers, which he had unloaded with the exception of three cases that were so badly broken that he was going to take them back again, and had started the elevator up, when the plaintiff jumped on as it was moving, and cried, 'Wait! stop!' which he did; that the plaintiff then requested him to return to the street which, after remonstrance, he also did; and that the plaintiff loaded the crate onto the elevator and he, Redding, asked him if it was 'all right,' and the plaintiff answered, 'Yes,' that then he, Redding, pulled the rope to go up and the elevator started and the accident immediately happened. Redding further testified, in substance, that the practice in regard to the use of the elevator was the same as that to which the plaintiff had testified. One Sawyer, called by the defendant, testified to the same effect. We have stated the substance of all the testimony that there was in regard to that matter. The defendant contended that Redding had the exclusive right to the use of the elevator at the time of the accident, and that the plaintiff was a licensee or trespasser, and was not there as of right. The plaintiff contended that he was rightfully on the elevator,

even if the defendant's goods were upon the elevator and the defendant's servant was using it.

"It was undisputed that the elevator was for the common use of all of the tenants of the building and their employees, and but for the practice or custom which existed the plaintiff's contention would be sound. But the effect of the practice which exists was to give to the servant of any tenant, who was using the elevator in his master's business, the exclusive right to use it until the business was finished, and to render the use or attempted use of it meanwhile by another permissive or wrongful. Understanding, as we do, that the practice was limited to the use of the elevator in the business of the tenants, it cannot be said, we think, that it was not a lawful and proper custom, and that it could not rightfully be taken into account by the jury in passing upon the question of the defendants' alleged negligence. It follows that the instruction objected to that if the jury found that Redding was using the elevator and had not finished using it, and the accident happened as he testified, then the plaintiff was a licensee and the defendants owed him no duty, and the plaintiff could not recover, was, under the circumstances, correct. It was not and is not contended that there was any evidence warranting a finding that Redding acted wilfully or wantonly and recklessly. It follows also that the instructions in regard to the question whether at the time of the accident Redding was acting within the scope of his employment were correct. The plaintiff, indeed, concedes, in effect, that they were, if the plaintiff was in possession of the elevator and Redding had as against him no right to use it until the plaintiff had finished using it. It was rightly left to the jury to determine whether Redding was or was not acting within the scope of his employment at the time of the accident if, as the plaintiff testified, Redding came into the elevator when he, the plaintiff, was in possession of it and started it up without saying anything to him, or if, being in possession of it and having a right to use it in his master's business, instead of doing so he turned aside as it were, to accommodate and assist the plaintiff, and the accident happened while he was so engaged. *Bowler v. O'Connell*, 162 Mass. 319, 15 Am. Neg. Cas. 447, 38 N. E. 498; *Driscoll v. Scanlon*, 165 Mass. 348, 15 Am. Neg. Cas. 711, 43 N. E. 100; *Brown v. Jarvis Engraving Co.*, 166 Mass. 75, 43 N. E. 1118." * * *

Employee of tenant injured while leaving elevator.

In *BAYNES v. BILLINGS ET AL.*, (*Rhode Island*, July, 1909) 73 Atl. 625, the facts are stated in the opinion by JOHNSON, J., as follows:

"The defendants were the owners of a building in the city of Providence known as the 'Billings Block.' The several floors of the building were used for business purposes and leased to different parties. Warren & Williams, jewelers, occupied the fourth floor, and the plaintiff was employed by that firm as an errand boy. The building was provided with a passenger elevator for the use and accommodation of tenants. This elevator at the time of the accident, July 11, 1904, was being run by a boy named William George. Upon the day of the accident the plaintiff, and another boy named Gaynor, together entered the elevator at the street floor. Gaynor at that time was in the employ of the Western

Union Telegraph Company, and had a message for delivery to a firm that occupied the fifth floor. Gaynor had previously been employed in the Billings Block. After the plaintiff and Gaynor were safely on board, the elevator ascended to the fifth floor; the plaintiff remaining therein. The elevator then waited at the fifth floor, for Gaynor to deliver his message and return, and the plaintiff still remained therein. Then the elevator descended to the fourth floor, where the plaintiff was employed, and he then alighted, and at the request of the elevator boy went upon the top of the elevator to arrange, straighten, or put in place a screen designed to protect people in the elevator from any objects that might fall down the elevator well. To enable the plaintiff to gain access thereto, and to leave the top of the elevator when he had finished, the elevator was lowered by George so that the top was on a level with the fourth floor. While the plaintiff was engaged upon the top of the elevator, the bell was rung at the fifth floor and the elevator started upward, and the plaintiff, in attempting to get off the moving elevator, was caught and injured. The case was tried in the Superior Court (Providence and Bristol counties), with a jury, November 5, 1908, and at the conclusion of the testimony the court directed a verdict for the defendants." * * *

"The plaintiff's declaration alleges that the defendants were the owners of the building known as 'Billings Block,' at No. 21 Eddy street, in said city of Providence, and that an elevator for the carriage of passengers was then and there provided, maintained, and operated in said building, and that the defendants were negligent in not providing and keeping in repair for said elevator some suitable device to prevent the elevator car from being started until the door or doors opening into said elevator shaft were closed as is provided and enacted under the provisions of section 16, c. 108, of the General Laws of 1896, as amended by chapter 921, p. 320, of the Public Laws, passed November 29, 1901, and as further amended by section 2, c. 973, p. 44, of the Public Laws passed April 3, 1902. The plaintiff then avers that while he was rightfully in said building as the employee of Warren & Williams, and rightfully and lawfully upon said elevator, and in the exercise of due care, and while in the act of leaving and stepping from said elevator, the door at the fourth floor of said building being open, then suddenly said elevator shot up, catching him between the jamb of the door and the elevator cage, by reason whereof plaintiff was injured, etc." * * *

The court reviewed the evidence and held that the case should have gone to the jury on the question of the plaintiff's due care and of the defendant's negligence.

Plaintiff's *exception* sustained.

Negligent operation of passenger elevator.

In MINOT v. SNAVELY ET AL., (U. S. C. C. A., Eighth Circuit, Missouri, July, 1909) 172 Fed. 212, appeal from judgment for \$5,000 for alleged negligent killing of plaintiff's husband, while passing from a passenger elevator in defendant's building, judgment was *reversed* for refusal to instruct as requested by defendants. The petition specified two grounds of negligence: 1. Negligent and careless operation and handling of the elevator by the person in charge thereof at the time Snavely received the injury which resulted

in his death. 2. That the agent or servant in charge of said elevator was wholly unfit by reason of his youth and inexperience to handle the elevator with safety, which facts defendants well knew or by the exercise of ordinary care might have known.

Evidence as to incompetency of the operator was introduced over defendants' objection.

The court (per CARLAND, District Judge) said:

"The master is liable to third persons for the damage caused by the wrongful or negligent acts of his servant in the course of his employment as such, and he is liable irrespective of the care used in the selection of that servant or of notice of his incompetency. It necessarily follows that the specification of negligence numbered 2 above mentioned, had no place in the petition, the evidence, or the charge of the court. Notwithstanding, however, evidence was admitted tending to show general incompetency of the person in charge of the elevator, and the jury were told by the court in its charge that it was the duty of defendants to employ a reasonably safe, prudent person, in the handling of the elevator. The liability of the defendants in the case at bar depended wholly upon the fact as to whether the person operating the elevator was guilty at the time Snavelly was passing from the elevator, which was the proximate cause of his death, except, of course, as this liability might be affected by the contributory negligence of Snavelly himself. As the defendants could not relieve themselves from liability for the negligence of the operator of the elevator by showing that they exercised proper care in his selection or had no notice actual or constructive of his incompetency, so it was incompetent for plaintiff to attempt to fix a liability upon the defendants by showing want of care in the selection of the operator of the elevator or actual or constructive notice of the general incompetency. We are of the opinion that the admission of the testimony herein quoted taken in connection with the charge of the court in relation thereto was necessarily very prejudicial to the defendants."

The instruction requested by defendants, the refusal of which was reversible error, is as follows:

"The court charges the jury that the charge in plaintiff's petition that the said defendants were negligent in employing an attendant who, on account of his youth, inexperience, and incompetency was unfit to have charge of said elevator car in question is withdrawn from your consideration, and in arriving at your verdict you must disregard said charge of negligence in that respect."

Employees injured in elevator accidents.

Employee injured while working on elevator — Master not liable.

IN *DEL SIGNORE v. THOMPSON*, (Massachusetts, April, 1908) 84 N. E. 466, an action for injuries to an employee while working on an elevator, plaintiff's exceptions to verdict, directed for defendant in the Superior Court, Suffolk county, were *overruled*. The facts as stated in the opinion by MORTON, J., were:

"The plaintiff was injured by being caught and crushed between the crossbeam on top of an elevator and the machinery at the top of the

elevator well. The elevator was a temporary one for use in the construction of the building, although the well in which it was placed was permanent. The declaration contained three counts—one at common law alleging that the elevator was negligently suffered by the defendant to be in an unsafe condition and the other two under the statute; one alleging a defect in the ways, works and machinery and the other negligence on the part of a superintendent. At the close of the evidence the court ruled that the plaintiff was not entitled to recover on either count and directed a verdict for the defendant. The case is here on exceptions by the plaintiff to this ruling and direction.

"The defects complained of are that the rope by which the elevator was raised and lowered had no tags or marks upon it to indicate to the engineer where the elevator was as it ascended or descended, and that there was no appliance by which those on the elevator could signal to the engineer above the third or fourth floor.

"The marks or tags did not constitute a part of the elevator or of the machinery by which it was operated, but were temporary in their nature and were put on for his own convenience with the assistance of others by the engineer who ran the engine by which the elevator was raised and lowered, and the want of them could not be said, therefore, to be a defect in the ways, works and machinery, or to constitute an unsafe or defective condition for which the defendant was liable, or to be evidence of negligence on the part of the superintendent." * * *

Employee falling into elevator well—Master not liable.

In *SIMONEAU v. RICE & HUTCHINS, INCORP.*, (Massachusetts, May, 1909) 88 N. E. 433, employee injured by falling into elevator well, judgment was rendered for defendant. The opinion by HAMMOND, J., states the case as follows:

"While the plaintiff, a young man then nineteen years of age, was moving some shoe racks upon a floor in the factory of the defendant, the heel of one of his shoes was torn off. Apparently for the purpose of examining the shoe, he seems to have left the racks, walked about three feet towards an elevator well, and upon reaching it raised his foot, at the same time placing his right hand for support upon the bar which was across the entrance to the elevator; the bar slipped lengthwise out of its support, and he fell into the well and was injured. In this large room, 100 feet in length, the place he selected against which to lean was the only one where there could have been any danger; and even here there would have been no danger had not his hand so touched the bar as to shove it lengthwise.

"Whether the plaintiff was in the exercise of due care is a question of considerable difficulty, but we have not had occasion to pass upon it, for, even if that question should be decided in his favor, there is still a fatal defect in his case. The bar which was placed across the entrance to the elevator and which the plaintiff displaced by his hand was made of wood and appears to have been about six feet long, four inches deep and one inch thick. It rested at each end upon 'an iron cleat or half square.' It could be moved lengthwise through the cleats. It was a very simple contrivance and could be easily understood by any boy of average intelligence. It was

the contrivance in use at the time the plaintiff entered the employ of the defendant and continued constantly in use up to the time of the accident. The defendant owed to the plaintiff no duty to change the condition of its factory for his accommodation. In entering the defendant's employ he assumed the obvious risks incident to the business. And this means not necessarily the risks which he actually knew about but also what by proper care he might know. As stated by Morton, J., in *Kenney v. Hingham Cordage Co.*, 168 Mass. 278, 282, 3 Am. Neg. Rep. 40, 47 N. E. 117: 'The question in each case is not whether the employee has actually observed and by a conscious act of the will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employee assumes them.' Under the circumstances of the present case the plaintiff must be held to have assumed the risk of the displacement of this rail in the manner described. Nor upon this branch of the case would it be material that this condition of things is not such as is required by Rev. Laws 1902, c. 104, § 43.

"No error was made in the exclusion of the evidence as to the prior condition of the elevator before the plaintiff entered the employ of the defendant. *Judgment for the defendant.*"

Employee injured by fall of elevator — Master liable.

In *MODLIN v. C. L. JONES & CO. ET AL.*, (*Nebraska*, June, 1909) 121 N. W. 984, employee injured by fall of elevator while he was riding upon it, judgment for plaintiff in the District Court, Adams county, was *affirmed*. In stating the facts of the case REESE, CH. J., said:

"This action was for damages resulting from personal injuries sustained by plaintiff while in the employ of defendants. There was a verdict and judgment in favor of plaintiff, and from which defendants appeal. Plaintiff was an employee of defendants, and his duties at the time of the accident were to assist another employee by the name of Dean in conveying wagons and other farm implements from the first to the third floor of defendant's business house by means of an elevator. The day on which the accident occurred was the first and only day plaintiff labored for defendants. At the particular time of the accident, plaintiff was assisting in taking side boards of wagon boxes, or wagon beds, to the third floor, using the elevator for that purpose. The boards were stood on end, leaning diagonally upon and against the bail of the elevator, and projecting above between two and a half and three feet. Dean had charge of the elevator; plaintiff's sole duty being to assist in removing the material to and from it, except that it is claimed that plaintiff was directed to notify Dean when the bottom or platform of the elevator came within two or three feet of the third floor, so that the elevator might be stopped in its upward movement, and the boards be the more easily removed and stored away. There was some evidence that plaintiff did give such notice on trips made before the accident occurred, but not on the last one. Plaintiff testified, in substance, that as they

approached the point at which the elevator was to be stopped, he saw that Dean was trying to stop the car, and that the notice was not necessary. As the car approached the top of the elevator shaft, it broke loose and fell a distance of about sixty feet, carrying Dean and plaintiff with it, and plaintiff was injured. There is no dispute as to the occurrence of the accident, nor as to the extent of plaintiff's injuries. That he was seriously and permanently injured is clearly shown by the evidence, and not contradicted by defendants. He was about twenty-six years of age when hurt, and was a healthy, robust young man, depending upon his manual labor for a livelihood. His injuries have made him a cripple and an invalid for life, and renders him incapable of ever engaging in his usual avocation. This is practically conceded; but it is contended that the injury was an accident against which ordinary prudence and care on the part of defendants could not guard, and that it was in no way caused or produced by any want of care or by negligence on their part, that the elevator was properly and well made and constructed, and that defendants were in no sense liable to plaintiff for the unfortunate accident, and should not be held therefor." * * *

The court treated the questions presented at some length, the principal rulings upon which are stated in the syllabus by the court as follows:

"1. In an action for damages for personal injuries caused by the breaking and falling of an elevator upon which plaintiff was being carried in the performance of labor on behalf of his employer, the pleading set out in the opinion held to embrace the question of negligence on the part of the employer in the matter of appliances provided, or the want thereof, for the safety of persons using the elevator in the course of the employment.

"2. All questions of fact and the weight of the testimony of witnesses are under proper instructions of the court for the consideration of the jury hearing the case on trial.

"3. Although a witness may be contradicted by other witnesses, even of a greater number, yet the testimony of such witness is for the consideration of the jury, and the receipt thereof is not erroneous, nor can the court say that the jury should ignore it.

"4. Where a witness has been permitted to testify to immaterial facts, and his testimony throws no light upon any controlling question involved, it will not require a reversal of the judgment where it clearly appears that the testimony given could have no effect upon the final decision of the case, and could work no prejudice to the losing party.

"5. Plaintiff testified that, immediately upon the occurrence of the accident, a son of the owner of the property where the accident happened remarked to such owner, a defendant in the suit, 'If you had fixed this when I wanted you to, this wouldn't have happened,' and defendant 'scowled and shook his head,' but said nothing. The evidence was not objectionable, and was for the consideration of the jury, although denied by both father and son on the witness stand; the jury being the judges of the credibility of the witnesses.

"6. There is no fixed rule as to what previous training or experience is necessary to qualify one as an expert witness. The question as to his competency to testify is primarily for the court upon objection being

made. If no general objection is made to the competency of the witness, his testimony goes to the jury, who must be the sole judges of its weight.

"7. In the closing argument of counsel for plaintiff, he stated his claims as to the rule to be applied in the measurement of damages, and to which counsel for defendants objected as being a misstatement of the law. The objection was overruled, the court stating that the jury would be instructed as to the measure of damages. An instruction upon the subject was given. The verdict showed that the jury were not influenced by the contention of counsel. *Held*, that such contention, even if improper, did not vitiate the verdict.

"8. Where interrogatories requiring special findings were submitted to the jury, and their answers were not inconsistent with the general verdict, a new trial will not be ordered where upon immaterial subjects the jury answered they 'did not know.'

"9. Where the evidence is conflicting, or where different minds might arrive at different conclusions from the facts proved, and the reviewing court might not have agreed with the jury in the first instance, the judgment of the trial court will not be reversed for that reason alone."

Employee crushed in freight elevator — Master liable.

In *FISHER v. CHAMBERS*, (*Nebraska*, April, 1909) 120 N. W. 931, appeal from judgment for plaintiff in the District Court, Lancaster county, judgment was *affirmed*. The facts are stated in the opinion by FAWCETT, J., as follows:

"This action was brought in the District Court of Lancaster county to recover for personal injuries sustained by being crushed in a freight elevator in the livery barn of defendant. The petition alleged the negligence of defendant's servants, and particularly of defendant's foreman, as the cause of said injury. The answer denies any negligence on defendant's part; alleges that the accident was the result of plaintiff's negligence, that at the time of the injuries complained of plaintiff was at defendant's place of business without invitation from the defendant, and without defendant's knowledge or consent, and that plaintiff assumed the risk of injury in the work in which he was engaged at the time he received the injuries complained of. The reply is a general denial.

"The evidence shows substantially: That defendant was the proprietor of a livery barn in the city of Lincoln; that the Anheuser-Busch Brewing Association, one of defendant's patrons, was in the habit of keeping one of its heavy delivery wagons in defendant's barn; that on the evening before the accident the driver of the delivery wagon notified plaintiff's employer that one of the wheels needed repairing and was advised that the repairs would be made by nine o'clock the next morning. About seven o'clock in the morning, plaintiff, by direction of his employer, went to defendant's barn for the purpose of getting the wheel. The evidence as to what occurred after plaintiff arrived at the barn is conflicting. Plaintiff testified that he spoke to the foreman of the barn and requested him to assist in getting the wheel from the wagon; that the foreman at first refused; that plaintiff started away, whereupon the foreman called him back, and then the foreman and one or more other employees of defendant engaged with plaintiff in the work of removing

the wheel from the wagon; that it was a heavy wagon, weighing about 2,000 pounds. The wagon was kept on the ground floor of the barn. When brought in in the evening, they would run it into its regular position for the night. In doing so they always attempted to run the wagon as near to the freight elevator shaft as possible, in fact, running it just close enough so that the hubs of the wagon would not strike the elevator. On the morning in question, it appears to have been standing within six to eighteen inches of the elevator. We think the evidence clearly shows that the wagon was so near the elevator that it was impossible to remove the wheel without standing on the floor of the elevator shaft. Plaintiff testifies: That in connection with defendant's foreman and such other employees, they obtained boxes to push under the axle after it had been lifted by a jack, so that the wheel could be removed; that defendant's servants had obtained the jack, and defendant's foreman, and one other employee were standing, holding the lever of the jack ready to lift the wagon so that plaintiff could push the boxes under; that in order to get into position to do this it was necessary for plaintiff to stand upon the elevator space; that before doing so he asked defendant's foreman if it was safe to stand there, and was assured that it was; that the question was asked a second time, and again he was assured that it was perfectly safe for him to step in there; that he stepped in, and while standing on the floor of the elevator shaft and leaning forward for the purpose of manipulating the boxes, the elevator came down upon him; that when the elevator struck him, he yelled and fell upon his face; and that the elevator still descended and crushed him badly. He denies having seen the elevator passing up or down during the time he was in the barn. Defendant's foreman testified: That when plaintiff came there and asked him to help take the wheel off the wagon, he told the plaintiff that he would do so as soon as he got the horses hitched up; that he had a number of horses on the floor all ready for hitching; that plaintiff said he must have the wheel at once; that he (the foreman) declined to help him, and thereupon plaintiff set to work himself to try and get the wheel off of the wagon; that neither he nor any of the men under him took any part in assisting plaintiff to remove the wheel and were not near him at the time he was struck by the elevator. The man who was running the elevator testified: That, after plaintiff got there and was standing near the wagon, he went up with the elevator to the floor above, in full view of plaintiff, loaded two buggies on the elevator, brought them down to the lower floor and unloaded them, and again ascended to the floor above for another load; that when he went up the second time plaintiff was standing within ten feet of the elevator shaft, within full view; that he loaded on some more buggies and started down the second time; that as he approached the ground floor he heard plaintiff 'holler;' that he immediately stopped and reversed his elevator.

"There was a trial to a jury and a verdict and judgment for plaintiff. Defendant rests his claim for reversal upon the one ground that the verdict and judgment are not sustained by sufficient evidence, and that therefore the court erred in overruling defendant's motion for a new trial. Defendant argues that, under the testimony as above outlined, the verdict of the jury cannot be sustained, that plaintiff is contradicted and

his testimony destroyed by the testimony of the two witnesses for defendant above referred to, and that plaintiff's testimony is entirely without corroboration.

"We are unable to concur in this view of the case. A further reference to the testimony will show that plaintiff is in fact corroborated by both of defendant's witnesses, while each of defendant's witnesses, to a certain extent, contradicts the other." * * *

The court then reviewed the testimony and held that the case was peculiarly one for the jury.

The ruling in the case is thus stated in the syllabus by the court:

"Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong." *Sycamore Co. v. Grundrad*, 16 Neb. 529, 20 N. W. 832.

Employee injured in freight elevator—Contributory negligence.—

In *VELLEKOUF v. D. FULLERTON & Co.*, (*New Jersey Supreme*, December, 1909) 74 Atl. 793, the case is stated by GARRISON, J., as follows:

"The plaintiff recovered a verdict for damages for personal injuries sustained under the following circumstances:

"The plaintiff, who was an employee of the defendant, was using the elevator in the latter's place of business to bring two barrels of lard from the top floor of the building to the first floor. When the elevator had stopped at the first floor, the plaintiff rolled one of the barrels off the platform, and having been ordered to clear the elevator went back to get the other barrel, and, not observing that the elevator was no longer there, stepped into the open shaft. The uncontradicted testimony of the person who had removed the elevator showed that it was done by a salesman of the defendant, who, having a truck load of stuff on the second floor, and was in the act of descending when he heard the cry that 'somebody fell down the hole.' These circumstances created no liability on the part of the defendant. The plaintiff by virtue of more than a year's use of the elevator was familiar with its uses and operation and with the presence or absence of safeguards, while the conditions as to light, whether natural or artificial at the time of the accident, were of course perfectly obvious to him. If the proximate cause of his accident was the removal of the elevator by a fellow-servant without warning, a contributing cause, without which the accident would not have happened, was the failure of the plaintiff to look in order to see whether the elevator platform on which he proposed to step was there to be stepped on. That this was a negligent act directly contributing to the accident cannot, I think, be questioned. Some degree of observation was required of him.

"The case, therefore, either presented no negligence of the master or none that was not known to and accepted by the plaintiff as incident to his employment, which, in legal effect, included the negligence of a fellow-servant; while, on the other hand, the plaintiff was beyond question negligent in not looking to see where he was stepping. The motion for the direction of a verdict should have prevailed." * * *

It was also held that "a written release of a claim for personal injuries, unless obtained by fraud or deceit, is a complete bar to an action for such injuries." Evidence also held "insufficient to go to the jury upon the question whether or not a release was obtained by fraud or deceit."

Employee engaged in electrical work in building injured by elevator — Defendant not liable

In *LYNCH v. ELEKTRON MANUFACTURING Co.*, (*New York Appeals*, April, 1909) 195 N. Y. 174, 88 N. E. 48, appeal by defendant from a judgment of the Appellate Division, Supreme Court, First Department (124 App. Div. 937, 109 N. Y. Supp. 1137), in an elevator case, judgment for plaintiff was reversed, the court (per WERNER, J.), holding that the plaintiff was contributorily negligent. FREDERICK HULSE appeared for appellant; DUDLEY DAVIS, for respondent. The opinion by WERNER, J., is as follows:

"The plaintiff was injured in an elevator accident, which occurred on the 12th day of January, 1903, in a building known as the 'Hotel Martha Washington' in the city of New York. He was at that time employed as an electrical worker by the defendants, McLeod & Ward, who had the contract for equipping the building with electrical wiring and appliances. The other defendant, the Elektron Manufacturing Company, was installing three passenger elevators which were housed in a single shaft consisting of three subdivisions or compartments, and were practically complete at that time. The most southerly of the three was being used to carry furniture to the upper floors, and it was operated by one McAvoy, an employee of the Elektron Company. The northerly elevator seems not to have been in use, and the extent to which the middle one had been operated is a matter of some uncertainty. There is evidence from which the jury might have found that the middle elevator had been left stationed at the twelfth floor of the building during the whole of the forenoon preceding the accident, but the fact probably was, as testified by several witnesses, that it had been moved upward by slow stages, while a workman stationed in the pit painted the heavy chain counterweight attached to the under side of the cage or car, and that it had reached the twelfth floor but a short time before the accident. On the morning of the accident the plaintiff had reported for duty at the usual hour, and had been directed by his foreman to put up some telephones in the basement. It transpired that the basement had been flooded, so that no work could be done there, and the plaintiff was then directed to put the lids on some junction boxes that were affixed to the walls of the elevator shafts at each floor of the building. When the plaintiff ascertained that the southerly elevator was being operated, he reported the fact to the foreman, who told him to make some arrangement with the operator. Thereupon the plaintiff returned to the elevator, and arranged with McAvoy, the operator, to call out as he was ascending or descending, so as to enable the plaintiff to keep out of harm's way. The plaintiff started to put the covers on the junction boxes, taking one elevator shaft or compartment after the other until he had finished at the first floor, and so on from floor to floor, until he had reached the eleventh, at about half after eleven o'clock in the forenoon. When he began work on the junction box at this floor in the middle shaft the elevator was at the twelfth floor. He stood with one foot upon the sill of the doorway leading into the

shaft and the other foot upon a cross-beam which extended at right angle across the shaft. While he was in this position the elevator descended, and inflicted the injuries described in the complaint and the evidence. There was no one in the elevator when it was started downward. Whitney, the defendant's foreman, was in the basement, and there gave the signal to the engineer.

"These facts sharply present the question whether the defendant is chargeable with negligence for the act of its foreman in starting the elevator without warning to the plaintiff, or whether the plaintiff was negligent in failing to notify the defendant's foreman that he intended to work in all of the elevator shafts. The evidence which bears upon that question is simple, and to our minds, conclusive against the plaintiff. The defendant's foreman knew that the electrical workers were in the building, but he did not know just what they were doing, or where they were working on that day, and he had not been informed that the plaintiff was at work in the shafts. The plaintiff knew that the southerly elevator was being operated, and he appreciated the danger of working in that shaft. Having reported the situation to his foreman, he was told to make an arrangement with the operator, and this he proceeded to do. But he said nothing to any one about working in the other two shafts or compartments. He went to work there without making any arrangement for his safety similar to the one he had made with McAvoy as to the southerly shaft. If he did this with knowledge that the middle elevator was being gradually raised to the top floor, as described by Whitney and Schock, he was plainly reckless, for he had no assurance that it would not again be lowered to the basement. Almost equally careless was it for him to attempt to work in either of these two shafts if he did not know whether the elevators were being operated or not. The very precaution which he took with reference to the elevator which he knew to be in operation should have led him to make inquiry as to the other two, and his failure to do it is inexcusable. It would have been a simple thing for him to have notified Whitney, the defendant's foreman, that he desired to work in all the shafts, and that would doubtless have resulted in some satisfactory arrangement for mutual protection. In any view of the case it seems impossible to escape the conclusion that the accident could not have happened but for plaintiff's own negligence.

"When we consider the question of the defendant's alleged negligence, the case is equally conclusive against the plaintiff. After Schock had finished painting the chain, he looked up into the shaft. Seeing no one, he called to Whitney to bring down the elevator, and the latter signaled to the engineer. There was nothing in the circumstances which required them to do more. Counsel for the plaintiff seizes upon the fact that Schock looked into the shaft as an admission that the defendant's employees realized the necessity for caution. That is explained, however, by Schock's testimony to the effect that he looked because the workmen about the building sometimes pried open the elevator doors and called down for the elevator. This testimony, it is true, was given by a witness called for the defendant, but it was uncontradicted. If it was accepted by the jury as true, it acquitted the defendant of negligence; and, if it was disbelieved or disregarded, there was absolutely nothing to prove that the defendant failed in any duty which it owed to the plaintiff.

"As the order of the Appellate Division, affirming the judgment entered upon the verdict, does not appear to have been unanimous, the exceptions taken by the defendant's counsel to the denial of his motions to dismiss the complaint properly present the questions which we have discussed. Aside from that, however, the same questions were raised by appropriate exceptions to the charge as made, and to the refusals to charge as requested."

Employee injured while assisting in loading freight elevator — Independent contractor.

In *ELLSWORTH v. HUNT*, (U. S. C. C. A., *Seventh Circuit, Illinois*, October, 1908) 168 Fed. 506, judgment for Hunt against Ellsworth, in an action for injuries while assisting in loading an elevator, was reversed. The opinion by BAKER, Circuit Judge, states the case as follows:

"The declaration was in two counts. In the first, plaintiff alleged that defendant operated a factory, in which a freight elevator was used; that defendant had on the third floor a 5,000-pound motor which he desired to lower to the ground floor and send away; that plaintiff was in the employ of Mix & Jackson, general teamsters; that Mix & Jackson, at the instance of defendant and for a valuable consideration, sent plaintiff with a heavy wagon to assist in loading and hauling away the motor; that on plaintiff's arrival he was ordered by defendant to go to the third floor and assist defendant in loading the motor onto the elevator, by which defendant intended and attempted to lower the motor to the ground floor; that prior to this time defendant had negligently permitted the cables and other appliances by which the elevator was raised and lowered to become in such an unsafe, weak, and insufficient condition that they were likely to break while the motor was being loaded or lowered on the elevator, all of which the defendant knew, but which plaintiff, through no want of care, did not know; that, while plaintiff was on the elevator assisting in the work in obedience to defendant's orders, the cables and other appliances broke as the direct result of their weak and unsafe condition, whereby plaintiff, without fault on his part, was dropped to the basement and severely injured. The second count differed from the first only in this: That the negligence alleged consisted of defendant's loading the motor onto an elevator which he knew was not of sufficient strength. To this declaration defendant pleaded the general issue."

The court reviewed the evidence and among other points, held that the question of independent contractor was for the jury, that it was error to instruct the jury that plaintiff had a right to recover on any basis other than that the accident was caused by the weakness or insufficiency of the elevator.

Employee operating freight elevator injured by its fall — Master liable. -

In *SIMMONS MANUFACTURING CO. v. ESKRIDGE*, (U. S. C. C. A., *Seventh Circuit, Wisconsin*, January, 1909) 168 Fed. 675, employee injured in the operation of a freight elevator, judgment for plaintiff was affirmed. The opinion was rendered by SEAMAN, CIRCUIT JUDGE, the case being stated as follows:

"The Simmons Manufacturing Company, plaintiff in error, was defendant below in the suit of John R. Eskridge, defendant in error, to recover for injuries suffered in the operation of a freight elevator in such defendant's factory, and this writ of error is brought for review of a judgment, rendered upon verdict of a jury, in favor of the plaintiff below, awarding \$2,250 as damages. The parties are referred to as plaintiff and defendant respectively, as designated in the suit below; and the following facts are undisputed:

"The plaintiff was in the employ of the defendant, and was so engaged in taking up a load of brass material, when the worn shaft broke and the elevator dropped from the fourth to the ground floor, thus causing the personal injuries for which damages were awarded. This elevator car was open at the top and operated by means of a cable, passing around a drum at the top of the shaft, together with belt power, stopped and started by means of a brake. Its only safety device was one known as the 'cable safety'—protecting only against breaking or slacking of the cable—although another safety appliance was well known, called a 'speed governor,' which protected as well against other mishaps causing the car to fall. When the car dropped, the plaintiff had hold of the brake rope to stop it, and retained such hold during the fall, thus dropping to the car floor through the fall of the brake rope when the car struck the bottom of the shaft. The plaintiff was not acquainted with the construction of the elevator, aside from his experience in its operation for two weeks; and negligence was charged against the defendant in the complaint, 1, for use of worn and defective machinery; 2, failure to equip with known and usual safety appliances, and, 3, failure both of inspection and to furnish plaintiff 'a reasonably safe place to work.'" * * *

CINCINNATI GAS & ELECTRIC COMPANY v. ARCHDEACON.(1)

Supreme Court, Ohio, March, 1909.

1. **ELECTRICITY — NEGLIGENCE.**—When two companies engaged in enterprises calling for the use of wires to carry electricity arrange for the joint use of a pole to sustain them, each company is, with respect to such use, charged with the same duty toward employees of the other as to its own, and the correlative duty of the employees to exercise due care for their own safety is the same as to both companies.

1. See *Archdeacon v. Cincinnati Gas & Electric Co.*, (*Ohio*) 17 Am. Neg. Rep. 346, and 19 Am. Neg. Rep. 494, for the decisions on the questions of pleading and practice referred to in the statement of facts in the case at bar.

2. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.— There can be no recovery against an employer for an injury to an employee which he would not have sustained if he had not voluntarily and unnecessarily used an appliance for a purpose other than that for which he knew it to be intended (2).
3. DIRECTING VERDICT.— Though issues joined in a case are triable to a jury, when the facts are conclusively determined in a manner not affected by material error, the application of the law to such facts is a function of the court, and its exercise, when properly invoked, becomes a duty (3).
(*Syllabus by the Court.*)

ERROR to Superior Court of Cincinnati.

ACTION by John Archdeacon against the Cincinnati Gas & Electric Company. From a judgment for plaintiff, defendant brings error. *Judgment reversed.*

"On March 28, 1903, the defendant in error brought suit in the Superior Court to recover from the plaintiff in error and the City & Suburban Telegraph Company damages on account of the death of his intestate, alleged to have been caused by the negligence of the original defendants. During the trial the defendant lastly named was by the plaintiff voluntarily dismissed out of the case, and the action preceded a verdict and judgment against the plaintiff in error. The Suburban Company was at the time the plaintiff's intestate received his fatal injury engaged in the transmission of messages by telephone, and in the record it is referred to as the telephone company. Archdeacon was employed by the telephone company as a lineman (4). It was alleged that some time prior to January 26, 1903, which was the day upon which the fatal injury occurred, the telephone company had permitted the electric light company to stretch a guy wire from one of its poles to a pole of the telephone company in such a negligent manner as to endanger the lives of the employees of the telephone company, and also to attach to its poles and there to maintain wires for the transmission of

2. For *Master and Servant* cases from 1897 to date, see Vols. 1-21 AM. NEG. REP.

See also AMERICAN NEGLIGENCE DIGEST (1909 edition) for the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907), where the same are collated under the title MASTER AND SERVANT and its several divisions and subdivisions.

3. As to directing verdicts, see AMERICAN NEGLIGENCE DIGEST (1909 edition), titles COURTS; PRACTICE; VERDICT, etc., the DIGEST covering all cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907).

4. See Notes of some recent cases relating to accidents to linemen, at end of the case at bar.

heavy currents of electricity; the wire being defectively insulated to the great danger of its employees. On January 26th, the plaintiff's intestate, acting pursuant to directions of his foreman, as the petition alleges, without knowledge of said dangerous condition, coming in contact with one of said wires, was killed without negligence on his part, and by reason of the condition of said light wires and said guy wire. The suit was for the benefit of the parents and the brothers and sisters of the intestate, he being unmarried. On April 7, 1903, the defendants filed separate answers admitting the appointment and qualification of the administrator, the corporate character of the defendants, and the allegations of the petition respecting the business in which they were engaged. March 11, 1905, the defendants filed a joint amended answer withdrawing the admission respecting the due appointment and qualification of the plaintiff, and denying that he became qualified until March 10, 1905. The defendants did not plead contributory negligence, but, as the basis for the introduction of evidence to establish it, relied upon their general denial of the allegations of the petition which were not expressly admitted, which included the plaintiff's allegation that his intestate received the fatal injuries without fault on his part. On their allegation that the plaintiff was not appointed and qualified until after he instituted the suit, the defendants recovered judgment in the Superior Court. That judgment was reversed by this court, and the cause was remanded for further proceeding. After the mandate of this court went down, and shortly before the trial was to be entered upon, the defendants asked for leave to amend their answer, and they tendered, first, an answer which not only alleged contributory negligence on the part of the plaintiff's intestate, but also repeated the allegations which this court had held to be insufficient as a defense respecting the appointment and qualification of the administrator. Leave to file the same was refused by the court. Then apparently recognizing the impropriety of an answer repeating a defense which this court had held to be insufficient, the defendants asked leave to file another answer pleading contributory negligence, and omitting the allegations with respect to the want of qualification of the administrator. Leave to file this was also refused. This refusal was said to be justified, if not required, by a rule of the Superior Court that amendments shall not be permitted after a case is called for trial. The cause then proceeded to trial upon the original pleadings. The plaintiff's case, as made by the evidence, was, in substance, that his intestate, at the time of his death, was twenty-one years of age, unmarried; that, upon the day

when he received his injury, he was directed to climb the pole in question for the purpose of restoring to its position a wire of the telephone company whose employee he was, which wire had been displaced by a falling limb, and that while carrying out that order in his own way, when he reached the proper height upon the pole, he abandoned the stirrups provided for that purpose and stood upon the guy wire, and, thus standing, attempted by means of a hand rod attached to the detached telephone wire to throw that about the electric light wire and draw it over into place; that in doing so, the guy wire being attached to the pole so as to be in contact with the metallic blade, which was connected with a truss rod to add stability to the pole, and his hand touching an electric light wire charged with a heavy current at the point where the insulation was defective, although the defect was not apparent, he established a connection which carried the fatal current through his body. Upon the trial a witness called to establish the earning capacity of the decedent was permitted, among other things, to produce three envelopes which were assumed to be pay envelopes. They were not identified as such otherwise than by testimony showing that they had been found in the house where the decedent lived with his parents, and by the indorsement thereon which were upon each, "Mr. Archdeacon," and upon one "Pay \$29.40," upon an-

" 24.75."

other "Pay \$28.80," and upon the third " 6.00." Another

" 18.75."

witness was permitted to testify, over the objection of the plaintiff in error, that one ascending the pole upon a mission such as that in which the decedent was engaged, would naturally stand upon the guy wire instead of the stirrups. He was also permitted to testify that, although he was a lineman, he had never known a guy wire to be so attached, nor had he ever known an accident to result from standing on such wire. Upon the conclusion of the plaintiff's evidence, the plaintiff in error asked the court to direct a verdict in its favor. That request was denied. It thereupon called as a witness in its behalf, the foreman of the telephone company who was present at the time of the injury to Archdeacon, who testified that addressing Archdeacon and one Cook generally, he directed them, or one of them to replace the detached wire. Archdeacon thereupon ascended the pole to determine the manner in which it should be done, and ascended it twice before the ascent upon which he received his fatal injury, that no direction was given to Arch-

deacon whatever as to the manner in which he should restore the wire to its place, but that was left to his own discretion and experience. At the conclusion of the testimony of this witness, the plaintiff in error again asked the court to direct a verdict in its favor, and its request was denied. Thereupon numerous requests or instructions were made by the defendant. Among them were the following, all of which were refused:

"5. If you find from the evidence that the defendants were guilty of negligence, still the plaintiff cannot recover unless the negligence was the direct and proximate cause of the accident."

"7. Although you should find that the defendants, or either of them, were guilty of negligence, still neither of said defendants would be liable in this action, unless that negligence was the direct and proximate cause of the injuries complained of. If you find that the direct cause of the accident was not the negligence of said defendants, but that the act of the deceased, John Archdeacon, either in standing upon a grounded guy wire, or in failing to observe that said guy wire was grounded, or in the method in which he passed the hand line he carried over the electric wire of the Cincinnati Gas & Electric Company, or in any other particular, was the direct cause of the injuries received, then your verdict must be for the defendants."

"17. If you find the deceased, John Archdeacon, did not use ordinary care at the time of the injuries complained of, such as a man employed as a lineman and skilled as such would have used under similar circumstances, and such want of prudence and care directly caused the injuries, then your verdict must be for the defendants."

"18. If you find that the method used by the deceased, John Archdeacon, to carry up the handline and replace the broken telephone wire was dangerous and unsafe, and that it was known to him to be so, and that there was another and a safer manner in which the same end could have been accomplished, then I charge you that the deceased, John Archdeacon, adopted the more hazardous method of doing the work at his peril, and that there can be no recovery in this action. Your verdict should then be for the defendants."

"9. If you find from the plaintiff's testimony in this case that the deceased, John Archdeacon, did not use ordinary care at the time of the injuries complained of, such as a man employed as a lineman and skilled as such would have used under like circumstances, and that such want of ordinary care or prudence contributed to the injuries received directly, then your verdict must be for the defendants."

" 16. If you find from the plaintiff's testimony in this case that the deceased, John Archdeacon, did not use ordinary care at the time of the injuries complained of, such as a man employed as a lineman and skilled as such would have used under like circumstances, and that such a want of ordinary care or prudence directly caused the injuries, then your verdict must be for the defendants."

" The jury returned a verdict for the plaintiff, and, a motion for a new trial being overruled, judgment was entered upon the verdict. That judgment was affirmed by the general term."

OUTCALT & PICKENLOOPER, for plaintiff in error.

CHARLES M. CIST, EDWARD COLSTON, W. A. RINCKHOFF, and D. T. HACKETT, for defendant in error.

SHAUCK, J. (after stating the facts as above). — Counsel for the opposing parties seem now to be agreed upon the proposition that we have before us a case which calls only for the application of the law to a state of facts determined by the concurrent testimony of all of the witnesses to all the material circumstances attending the death of the intestate of the defendant in error. Counsel for the company, by their motion made at the conclusion of the plaintiff's evidence for a directed verdict in its favor, and a renewal of that motion after the introduction of the only witness called by it, have placed themselves in a position to insist that the case presented only a question of law. Their applications for a directed verdict being denied, complying with the ruling of the court, they requested the court to give to the jury certain familiar propositions of law respecting proximate cause and contributory negligence for their guidance in determining whether the company was liable or not. These were all refused. A verdict and judgment having been rendered in favor of the original plaintiff, his counsel now insist that, although some of the instructions requested were undoubtedly sound propositions of law, their refusal does not constitute a ground for reversing the judgment, because upon the undisputed facts, or, which is the same thing, upon the harmonious testimony of all the witnesses, the plaintiff was entitled to recover as a matter of law. Counsel agree that ordinarily questions of negligence, contributory negligence, and proximate cause are mixed questions of law and fact to be determined by the jury upon proper instructions, but that conformably to the rules laid down by this court in *Penn. Co. v. Rathgeb*, 32 Ohio St. 66, and *Lake Shore & M. S. R. Co. v. Liidtke*, 69 Ohio St. 400, 15 Am. Neg. Rep. 652, 69 N. E. 653, when all the material facts touching those questions are established without dispute in the testimony, the question becomes a question of law merely.

This is but an application of the rule of obvious importance that the function of the jury being to determine issues of facts, when the facts are conclusively determined in a manner not affected by any error, nothing remains to be done but to apply the law to those facts, and that application is a function of the court. And this is true at whatever stage of the progress of a case, or in whatever manner the material facts may be thus conclusively established, whether it be by the statements of counsel made for the purpose of the trial or by the failure of the party upon whom the burden of proof rests to offer substantial evidence in favor of all the allegations which the issues require him to support, or by the concurrent testimony of all the witnesses, or by an agreed statement of facts, or by a special verdict, or by the answer of juries to interrogatories. It is subversive of the public interests and promotive of no right of either party to continue a contest before a jury when nothing is involved but the application of the law to a state of facts conclusively established. We unite with counsel for both parties in the conclusion that this is such a case. The question for determination, therefore, is whether the facts appearing upon the trial of the case show a right to recover or not.

Some recent refinements upon the law of proximate cause and contributory negligence have expanded judicial opinions and aided in filling the pages of text-books, but they do not seem to make the law clearer or its application more certain. There is no occasion to doubt that by their arrangement for the joint use of the wooden pole, upon which the decedent received his fatal injury, for the purpose of carrying their wires, each company became charged, as to that use, with the same obligations to employees of each company as to its own, and the employees of each company became charged with the correlative duty of exercising due care for their own protection with respect to both the companies. Could there be a recovery in the present case if the decedent had been an employee of the plaintiff in error instead of the telephone company? According to the testimony of all the witnesses, both as to the conditions existing at the time of the fatal injury and as to the operations of the electric current, it was indispensable that four distinct acts, all alleged to be negligent, should concur. They are that the company attached its guy wire to the pole at the point where it was in contact with a truss plate, thus grounding the guy wire; that its line wire was defectively insulated; that the decedent placed his foot upon the guy wire instead of upon the stirrups, or steps, provided for that purpose; and that while in that position he brought his hand in contact with the

defectively insulated wire. If any one of these four conditions had been omitted, according to the testimony, the decedent would have received no injury. Assuming the negligence of the company, both as to the manner of attaching the guy wire and the maintaining of the defectively insulated line wire, would it naturally expect an injury of this character to result from those defective conditions if known to it, or if capable of being known by the exercise of ordinary care? All of these dangerous conditions were beyond the reach of the inexperienced members of the public, and where they might affect only those who were familiar with the surrounding conditions, or would be entitled to be informed respecting them if they were not so familiar. The decedent was an experienced lineman, and there is no suggestion that he needed to be informed as to the perils of his occupation.

The company is liable in the absence of contributory negligence for such consequences as would, in the exercise of ordinary foresight, be regarded as likely to result from its negligence. In the exercise of such foresight would it have been foreseen that these conditions, inaccessible to persons not engaged in the dangerous occupation of maintaining the lines, might naturally lead to injury of those so engaged? The obvious and known purpose of guy wires is to give stability to the poles to which they are attached. The obvious and known purpose of the stirrups or steps with which this pole was supplied was to furnish the means of ascent and descent to those who were charged with maintaining the lines. The presence and purpose of the stirrups were obvious and were well known to the decedent; for not only was he experienced in his employment, but he had twice ascended and descended by them but a few minutes before the ascent upon which he received his fatal injury. The contact of his hand with the wire carrying the fatal current seems to have overruled fortuitously while he was attempting to pass a hand rope over it, but like observation cannot be made with respect to his position upon the guy wire. However little he may have reflected upon the consequences which might result therefrom, he assumed that position purposely and unnecessarily. If his contact with the guy wire had resulted from accident, as by the giving way of a stirrup or other chance incident to the performance of his duty, important considerations, now absent, would have been introduced into the case. In view of the considerations actually presented, can it be said that the injury to the decedent was a consequence to be anticipated in the exercise of ordinary foresight? Furthermore, observing how closely allied are the subjects of proxi-

mate cause and contributory negligence in cases of this character, and remembering that the doctrine of comparative negligence has never been applied in this State, can it be said that the decedent exercised due care for his own safety? Neither in brief nor record can we find sufficient reason for an affirmative answer to either of these questions. They must be answered in the negative.

While the case presents an unusual state of facts, they are not, in legal aspect, without precedent. In *Huber v. La Crosse City Ry. Co.*, 92 Wis. 636, 66 N. W. 708, the right to recover was denied in a case depending upon the same considerations. This conclusion renders all other assignments of error immaterial, and none of them is considered. Judgment of general and special term reversed and final judgment for plaintiff in error.

Judgment reversed.

CREW, C. J., and SUMMERS and DAVIS, JJ., concur.

SPEAR and PRICE, JJ., concur in the judgment of reversal, but not in the final judgment.

NOTES OF CASES RELATING TO ACCIDENTS TO LINEMEN.

Linemen injured by electricity.

In *CONRAD v. SPRINGFIELD CONSOL. RY. CO.*, (*Illinois Supreme*, April, 1909) 88 N. E. 180, it appeared from the opinion by VICKERS, J., that "on August 21, 1906, James T. Conrad was employed as a lineman by the Central Union Telephone Company. On that day he was engaged in taking down and putting up telephone wires on a telephone pole at the corner of Sixth and Monroe streets, in the city of Springfield, and while so engaged an old telephone wire which he was handling broke and fell upon a trolley wire belonging to the Springfield Consolidated Railway Company, carrying a high voltage of electricity, which was thereby communicated to his person, causing severe personal injuries. In an action on the case against the street railway company Conrad recovered a judgment for \$3,000, which has been affirmed by the Appellate Court for the Third District."

In reviewing some of the points raised by appellant the court said:

"Appellant sought to prove that the use of guard wires was a menace rather than a protection, and that their use had been generally discontinued in recent years. This evidence was not offered for the purpose of proving that the accident in question was not the proximate result of the omission charged, but rather to show the reason why the appellant had been permitted for a number of years to disregard the condition. While one charged with a tort resulting from the violation of an ordinance or a statute may show in defense that a compliance would not have prevented the injury complained of, yet such evidence must be confined to the particular injury involved, and not directed to the general

adaptability of the legislation as a means of preventing injury. This is a legislative question. The evidence excluded by the court, of which complaint is made, relates to this general question, with which the court was not concerned. There was no error in its exclusion.

"Appellant's contention that appellee must be held, as a matter of law, to have assumed the risk, cannot be sustained, since the doctrine of the assumption of risk is only applicable to cases arising between master and servant. *Shoninger Co. v. Mann*. 219 Ill. 242, 76 N. E. 354, 19 Am. Neg. Rep. 198." *Judgment affirmed.*

In *HAUSLER v. COMMONWEALTH ELECTRIC CO.*, (Illinois Supreme, April, 1909) 88 N. E. 561, the opinion by HAND, J., states the case as follows:

"This was an action on the case, commenced in the Superior Court of Cook county by the appellee, Louisa A. Hausler, administratrix of the estate of her deceased husband, John H. Hausler, against the appellant, the Commonwealth Electric Company, to recover damages for the death of said John H. Hausler, alleged to have been sustained by reason of the negligence of the appellant. The declaration contained five counts, and the general issue was filed. The jury returned a verdict in favor of the appellee for \$3,000, upon which the court rendered judgment, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

"In the brief filed in this court by appellant no claim is made that the trial court erred in the admission or rejection of evidence or in its rulings upon the instructions; the only objection urged as ground of reversal which this court can consider being that the trial court erred in declining to take the case from the jury at the close of all the evidence. In passing upon that question this court cannot weigh the evidence; but if there is evidence in the record fairly tending to support the appellee's cause of action, as averred in her declaration, the judgment must be affirmed.

"John H. Hausler, at the time of the injury which caused his death, was in the employ of the Chicago Telephone Company as foreman in charge of a gang of men who were engaged in stringing telephone wires upon a row of poles located in a public alley between Parnell and Norman avenues, in the city of Chicago. Said alley runs north and south, and is crossed at right angles by Sixty-Sixth Place, which runs east and west. The poles north of Sixty-Sixth Place were in the exclusive use of the telephone company, and the poles south of Sixty-Sixth Place were in the joint use of the telephone company and the appellant. The poles south of Sixty-Sixth Place had two arms thereon; the wires of the appellant being strung upon the upper arms, and those of the telephone company upon the lower arms. On the morning of the injury Hausler and his men went to the alley at Sixty-Sixth Place, and placed their wagon in the alley north of Sixty-Sixth Place. The wire which they proposed to string upon said poles was wound upon a reel located upon the rear end of the wagon. Under the direction of Hausler a workman took the end of the telephone wire and carried it up and fastened it to the arm of the first pole north of Sixty-Sixth Place. The wire was then unreeled, and its end was taken by Hausler and carried south along the alley as it was unwound, until he had passed the first pole south of

Sixty-Sixth Place, which was a combination pole. From a position some distance south of said pole he flipped the wire onto the lower arm upon said pole. He then carried the wire south as it was unwound, until he had passed some distance south of the second pole south of Sixty-Sixth Place, which was also a combination pole, when he attempted to flip the wire over the lower arm of that pole, and in so doing the wire which he held, at a point about half way between the first and second poles south of Sixty-Sixth Place, looped over the wire of the appellant, which was strung to the upper arms of said poles, and which sagged at that point. The wire of appellant, at the point where it was crossed by the wire which was held by Hausler, was not properly insulated, the result of which was, as the wires crossed at that point, the current of electricity, with which appellant's wire was heavily charged, passed over the wire held by Hausler, and instantly killed Hausler and the workman at the wagon, who was reeling off the wire as Hausler carried it south along the alley.

"There was an ordinance in force in the city of Chicago by virtue of which the appellant was authorized to erect its poles and string its wires in said alley, which provided that the appellant should keep properly insulated all wires owned and operated by it, and that all overhead wires used by the appellant should be protected by guard wires or other suitable mechanical devices. The wires of appellant at the point where the injury took place was not protected by guard wires or other suitable mechanical devices. The evidence tends to show that a wire similar to that in use by appellant at the place where Hausler was killed, when properly insulated, is free from danger from the contact therewith of other wires; but, if it is not properly insulated, there is great danger of injury to a person holding a wire which comes in contact with a wire charged with electricity, as was the wire of appellant at the time Hausler was killed. The part of the wire of the appellant which was not properly insulated was at a joint in the wire, and the wire at that point was of the same size and color as other portions of the wire, and was some thirty feet from the ground above Hausler when he passed beneath said joint, and the defective insulation thereof would not readily be observed by a person passing beneath the wire.

"We think it clear, from the foregoing statement of facts, that this court cannot say, as a matter of law, that the appellant was not guilty of negligence in permitting said joint to remain exposed in a public alley of the city of Chicago, and between two poles upon which, immediately beneath said wire, it was known to the appellant that the employees of the telephone company would be required, in the course of their employment, to string the wires of the telephone company, or that Hausler, as a matter of law, can be said to have been guilty of such contributory negligence as to bar a recovery. Electricity is a silent, deadly, and instantaneous force, and a person or company handling it is bound to know the dangers incident to its use in a public street or alley, and is bound to guard against accident by a degree of care commensurate with the danger incident to its use. *Rowe v. Taylorville Electric Co.*, 213 Ill. 318, 17 Am. Neg. Rep. 215, 72 N. E. 711. We do not think the trial court erred in declining to take the case from the jury.

"It is also urged in this court that the trial court erred in overruling the motion in arrest of judgment made by the appellant. That question seems to have been raised in this court for the first time, and without the ruling of the court upon that motion having been assigned as error in this or the Appellate Court. Such practice is not permissible.

"Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed." *Judgment affirmed.*

In *CONSOLIDATED GAS, ELECTRIC LIGHT & POWER CO. v. STATE*, use of *SMITH ET AL.*, (*Maryland Appeals*, January, 1909) 72 Atl. 651, the facts are stated in the opinion by PEARCE, J., as follows:

"This suit was brought by the State, for the use of Mary O. Smith, widow, and Harry E. Smith, infant son, of Harry H. Smith, deceased, against the Consolidated Gas, Electric Light & Power Company, to recover damages for the death of said Harry H. Smith, caused by the alleged negligence of the defendant. There was a verdict of \$4,800, of which there was apportioned by the jury to the widow the sum of \$2,300, and to the infant child, \$2,500, and from the judgment of this verdict the defendant has appealed.

"There are thirty-eight exceptions, the last being to the ruling on a motion to strike out certain evidence admitted subject to exception, and upon the prayers, and all the others being to ruling on the admission of evidence.

"The deceased was a lineman of the Western Union Telegraph Company, and came to his death on May 8, 1907, while engaged in his work as such lineman, by reason of his hand coming in contact with an electric light wire of the defendant company, carrying a current of 2,200 or 2,300 volts, supported upon a cross-arm belonging to the defendant company, and maintained upon a pole of the Western Union Telegraph Company. At the point where Smith's hand came in contact with this wire the insulation had been cut away by some one unknown, for the space of an inch, or an inch and a half, close to the cross-arm. The pole in question was a cable pole. At its top were seven double arms of the telegraph company carrying about sixty of its wires. The cable box was below these seven arms, and below these seven arms was a platform about twenty feet from the street, supported by two iron braces or angle irons bolted to the pole. About six feet below the lowest Western Union arm was the cross-arm of the defendant carrying its wires, and below that was another cross-arm belonging to the United Railways & Electric Company. On the day of the accident Smith, in company with Eyler and Uhler, two other linemen of the telephone company, were engaged in stringing an insulated, but uncharged wire from this cable pole on Guilford avenue, between Eager and Chase streets, to the Belvedere Hotel. Smith took a hand line to which was attached the wire to be strung, and with the rope in his hand he climbed the pole, Eyler being on the next pole south, and Uhler being on the elevated railway structure in the street at that point. Eyler described the situation as follows: 'Smith went up to the angle irons under the platform. * * * The angle irons he was against were on the opposite side of the pole from that shown in the photograph offered in evidence. * * * I was

there when it was taken. The photograph now handed to me is the photograph that was taken when I was present. He went up as high as the platform. Then he went to pass the rope he had taken up. He got his right foot down in the angle iron on the east side of the pole, and had his left foot on the west angle iron, with his back leaning against the west angle iron, and, taking the rope in his left hand, and holding on with his other hand, he threw the rope or twirled it over the wires, and tried to grab the end of it, but in throwing the rope his fingers came in contact with that bare spot, and I saw a flame at the point where his hand was in contact with the wire, and I called to Uhler, "Harry is burning up." Eyler at once came down from his pole, ran to the pole on which Smith was hanging, and climbed it, and just as he was about to seize Smith's coat in the effort to release him, Smith fell to the ground insensible, and died an hour or two later. He was a young man about twenty-eight years of age, a powerful man, in excellent health, sober, industrious, and a competent lineman of five years' experience, and receiving sixty-five dollars a month from the telegraph company." * * *

The court reviewed the numerous exceptions, and found no reversible errors. *Judgment affirmed.*

In *FRENCH v. SABIN*, (*Massachusetts*, May, 1909) 83 N. E. 845, the case is stated in the opinion by BRALEY, J., as follows:

"The accident causing the injury and death of the plaintiff's intestate resulted from an electrical shock, received while he was adjusting a telephone wire connecting the house of a subscriber with the main line. If it be assumed there was evidence of the defendant's negligence arising from the defective insulation of the electric lighting wires with which the decedent while at work came in contact, the plaintiff was bound to offer some evidence from which the jury could find that his intestate was in the exercise of due care. In substance the evidence when examined tended to prove that for some years previously, and at the time of his death, the decedent was employed by a telephone company whose wires were strung on cross-arms of the poles which also supported the wires of the defendant's electric lighting system. It having become necessary to make the connection, he left the central office, taking a test box with other tools, and went to a pole opposite the premises, up which he was seen to ascend. While this pole had been set in place of an old pole, which had been cut off at the ground, the old pole, still supporting both sets of wires, had been attached to the new pole by a guy wire, and, from the evidence of the plaintiff's expert electrician, all the apparatus was in proper repair except the lighting wires, carrying at the time a current of 1,100 volts. A tie wire, by which one of the lighting wires was attached to the insulator on the side of the pole where he would have to perform his work, had an uninsulated projecting point, and the insulation on these wires also had been worn off in many places, by friction with the branches of the trees through which they ran. The expert evidence very plainly showed that if a person ascended the pole to the height required, and his body touched the bare wire, and the telephone wire or guy wire simultaneously, or, as the lighting wires where they touched the trees had become grounded, if he came into contact with

them, a circuit through his body would be complete, and he would receive an electrical shock insufficient to cause death, but producing temporary paralysis, owing to loss of muscular control.

"It was into this field of manifest danger, whose general conditions he either knew or in the exercise of reasonable prudence should have known, that the decedent entered. But if from his knowledge and skill, gained from previous experience, he well might have appreciated the perils of his position, there is no evidence as to his movements just before he received the shock and fell to the ground. The only witness of his conduct at the pole saw him ascend, until he disappeared from view in the foliage. It may be inferred, from the telephone wires being afterwards found connected, and from his calling the office and talking with the operator that his work having been completed he was ready to descend, but beyond this point of time everything is left to conjecture. If it is true that this witness also happened to hear the conversation, and heard immediately after an outcry of distress, and saw him falling through the branches of the trees, what preceding act either of omission or commission brought him in touch with the current is wholly problematical. It would serve no useful purpose to enter upon any discussion as to what he possibly may have contemplated, or done, preparatory to a descent, or change of position, for not being based on any positive evidence, direct or circumstantial, any supposition would be inconclusive, and wholly insufficient to supply the requisite proof. The plaintiff, realizing this dilemma, invokes the familiar rule that due care may be proved, if enough circumstances appear from which the jury can infer that nothing in the conduct of the plaintiff contributed to his injury. *Prince v. Lowell Electric Light Corp.*, 201 Mass. 276, 87 N. E. 558. But, as we have said, all the circumstances do not appear, as the conduct of the decedent at the moment when he received the shock cannot be inferentially supplied. *Donaldson v. N. Y., N. H. & H. R. R.*, 188 Mass. 484, 486, 74 N. E. 915, and cases cited; *McCarthy v. Clinton Gaslight Co.*, 193 Mass. 76, 78 N. E. 739; *Lizotte v. N. Y. C. & H. R. R. Co.*, 196 Mass. 519, 83 N. E. 362; *Brodie v. Rockport Granite Co.*, 197 Mass. 147, 83 N. E. 321.

"The exceptions to the exclusion of evidence may be briefly noticed. It was wholly irrelevant whether the decedent generally was a competent and careful man in the opinion of the witness, whose answer, that he had 'always known him to be in that vicinity,' was excluded. Proof of prior acts of due care when engaged in his work had no tendency to prove that he was careful on the day of the accident. Having failed to offer any affirmative evidence of his intestate's carefulness, the plaintiff was not harmed by the exclusion of the testimony as to the defective condition of the defendant's wires in other places, or of the system as a whole, or of the conversation of the defendant's superintendent."

Plaintiff's exceptions to verdict for defendant in Superior Court, Norfolk county, *overruled*.

In *MUSOLF v. DULUTH EDISON ELECTRIC Co.*, (*Minnesota*, July, 1909) 122 N. W. 499, judgment for plaintiff for \$5,000 in the District Court, St. Louis county, in action for death of a lineman in employ of a telephone company, was *affirmed*. The opinion by JAGGARD, J., states the facts as follows:

"This action was brought by plaintiff, as administratrix, respondent herein, of the deceased, to recover from defendant and appellant damages for the death of the said deceased while in the employ of a telephone company on May 22, 1908. The deceased was working at the upper cable, suspended between poles of the telephone company some eight or ten feet above defendant's wires. All wires were many feet above the ground. His helper had pulled a platform up to him in accordance with custom, and then at the request of the deceased, took a piece of wire from a coil on the ground, which was coiled up there for that purpose, and by means of a rope drew it up to deceased. The piece of wire sent up was too short for its intended purpose. Deceased asked him to send up another and longer piece. The assistant procured such a piece, coiled it up, tied it to the rope, and was pulling it up to deceased, when the wire became uncoiled. One end of it came in contact with the wires of defendant and appellant, heavily charged with electricity. As it came up to the platform, deceased reached over and, instead of grasping the rope to which the wire was attached, took hold of the wire itself with his left hand. The current was grounded through the deceased, who had put his right hand on some other substance, passed through him, precipitated him to the ground, and caused his death. The negligence with which the defendant was charged was 'that the defendant strung and maintained two wires through which was transmitted a heavy electrical current upon poles of the telephone company, and that the wires so strung and maintained by the defendant were negligently and improperly insulated; that the electrical current passing through them was dangerous and fatal to human life, and a menace to the public and any one who should come in contact with or near the wires.' The jury returned a verdict of \$5,000. This appeal was taken from the denial of the usual motion in the alternative." * * *

Numerous authorities were cited by the learned judge in support of the points decided, the rulings being stated in the syllabus by the court as follows:

"Deceased, an employee of a telephone company, while working on its wires suspended between poles was killed by electricity communicated through contact of a heavily charged wire of defendant electric company with a wire of which deceased took hold when it was raised to him by another servant. It is *held*:

"1. Defendant's negligence was for the jury.

"The evidence of defective insulation, uninspected for six years, presented a question of fact.

"Deceased was on the premises of his employer and was neither a trespasser nor a licensee.

"2. Defendant owed him the affirmative duty of exercising commensurate care to protect him from danger due to its wires carrying a dangerous current.

"Whether the failure of defendant to properly insulate its wire was the proximate cause of the damages was for the jury.

"3. Deceased was not as a matter of law guilty of contributory negligence, nor was his death as a matter of law due to negligence of a fellow-servant.

"4. An instrument whereby plaintiff agreed not to sue the telephone company unless it should be held as a matter of law that plaintiff could not recover damages against the defendant company, and unless the consideration paid should be returned to the telephone company, is construed to be a covenant not to sue, and not a release. Plaintiff was not precluded thereby from enforcing liability against defendant.

"5. That instrument did not purport to be, and did not operate as, a partial satisfaction. Defendant was not entitled to deduct its consideration from the amount of the verdict."

In *OLSON v. NEBRASKA TELEPHONE CO. ET AL.*, (*Nebraska*, November, 1909) 123 N. W. 422, on motion for rehearing (see former opinion 88 Neb. 735, 120 N. W. 421), the following points (as per the syllabus by the court) were decided:

"1. An employee of a telephone company directed by his master to fasten a cable to an overhead messenger wire thirty feet above a pavement, unless warned to the contrary by his master or by obvious conditions, is justified in relying upon an ordinance of the city forbidding the maintenance of wires carrying an electric current for light or power purposes within five feet of telephone wires, and commanding that all such electric light wires be insulated and defects therein repaired at once.

"2. Notice to an employee that a master does not and will not inspect poles, cross-arms, wires, or implements used by a lineman, but that the duty to make such inspection is cast upon the servant, that he must satisfy himself of their safety before climbing upon or about poles or working with such wires, and that it is his duty to report any defect therein, does not relieve the master from the duty he owes said servant to exercise reasonable care to furnish him a reasonably safe place, independent of such poles, cross-arms, and wires, to work in; the nature of the work to be performed being considered."

Motion for rehearing *overruled*, but former opinion *modified*. See 120 N. W. 421, 88 Neb. 735 (next paragraph) the first and second paragraphs of the syllabus and so much of the opinion as refers thereto being withdrawn on the rehearing.

The former opinion in the *OLSON* Case, (*Nebraska*, March, 1909) 120 N. W. 421, 88 Neb. 735, was rendered by REESE, CH. J., the points decided being stated in the syllabus by the court as follows:

"1. A contract by which a master seeks to impose upon his servant duties and obligations which the law imposes upon the master, and to relieve the master from liability for negligence on his part, is against public policy, and void.

"2. Where the question of negligence is presented by the pleadings, and there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is for the court. See *Brady v. Chicago, St. P., M. & O. R. Co.*, 59 Neb. 233, 80 N. W. 809.

[Paragraphs 1 and 2 were withdrawn on rehearing.]

"3. Where the ordinances of a city require an electric light company to maintain its electric light wires in a taut condition to avoid swinging contacts, and to keep such wires properly insulated, and, wherever it is

necessary for such electric light wires to cross the line of a telegraph or telephone line, to string its said wires at a distance of not less than five feet from the wires of said telegraph or telephone line, a failure on the part of said electric light company to comply with all or any of such requirements is negligence which will render it liable to any person who, without fault on his part, is injured by reason thereof.

"4. And in such a case, where the defenses of assumption of risk and contributory negligence are relied upon, it is error to withdraw the case from the jury, unless such defenses are established by evidence so clear that reasonable men would not be warranted in reaching a different conclusion."

Judgment for defendants in the District Court, Douglas county, was *reversed*

See the report of the rehearing in the OLSON case (*supra*), 123 N. W. 422, in which the first and second paragraphs of the syllabus to the former report were withdrawn.

In REED v. MORRISTOWN ELECTRIC LIGHT & POWER Co., (*Pennsylvania*, March, 1909) 72 Atl. 1045, nonsuit was *affirmed*, the opinion rendered being as follows:

"A nonsuit was entered on the ground of the contributory negligence of the plaintiff in not wearing gloves while working on a pole on which there was a high-tension electric light wire. The facts important in considering that question are stated in the opinion of the court overruling the motion to take off the nonsuit. An equally tenable ground for entering a nonsuit was the failure to show any negligence on the part of the defendant that was the proximate cause of the accident. The defendant's guy wire extended from the top of a pole thirty-five feet high over private property to a hook in a stable wall eleven feet above the ground. At the pole this wire was seven feet above the wires of the telephone company, the plaintiff's employer. About two months before the accident, the telephone company extended a guy wire from the place where its wires were placed on the pole to the same hook in the stable wall. On this wire there was an insulation ball thirty inches from the pole. The result of this was that, since the guy wires were in contact at the hook to which they were fastened, if the defendant's wire became charged the current would pass to the line of the telephone company as far as the insulating ball. Whatever danger there was in this situation was brought about by the telephone company in its use of the pole. The defendant's construction was safe. The guy wire was above the reach of any one on the ground or any one working on the pole, and its accidental charging would have been harmless. The judgment is *affirmed*."

In SHANK v. EDISON ELECTRIC ILLUMINATING Co., (*Pennsylvania*, June, 1909) 74 Atl. 210, judgment of nonsuit was *affirmed*, the opinion of STEWART, J., stating the case as follows:

"The plaintiff was a lineman in the employ of the defendant company. An interruption having occurred in the circuit, he ascertained by using

the switch board at the power plant where the trouble was on the line. Before proceeding to make the necessary repair, in the presence of his foreman, the company's electrician, and the engineer in charge of the engine, he turned off the current, and told those present not to turn it on until he was heard from. He then started in company with his foreman to the place of interruption. Within a half an hour after he left, the electrician and the engineer went to the switch board and tested the circuit. No break being disclosed by the test, the engineer turned on the current, with the result that the plaintiff, then engaged with the wires in repairing the break, received the charge and was severely injured. Manifestly the plaintiff was injured through negligence not his own. Was it the company's negligence or the negligence of a fellow employee? In the general business in which defendant is engaged, furnishing electric light and power, the interruption of the circuit from one cause and another is a matter of such frequent occurrence that it is necessary to keep steadily employed trained men whose business it is to make repairs in the line and maintain it in working condition. It is alike necessary to employ others of technical skill to co-operate in this general work. The whole business of repairing the line, whether regard be had to the actual work on the line, or the care of the circuit while men are so engaged, must necessarily be done by employees engaged in the general business under the direction of the employer. It would be wholly impracticable for an employer to personally attend to such detail, and therefore it is that such work may be properly, and commonly is, intrusted to employees. Where this is so, the duty of the employer extends no further than to employ competent and suitable fellow-servants and supply them with everything needed for the work. In all such cases the employee is presumed to have contemplated that work incidental to that which he engaged to do would be done by fellow employees, and he is held to have assumed all risk for their negligence in doing it. Here the whole dependence of the plaintiff was on the faithful and intelligent co-operation of the electrician and engineer, both of whom were admittedly competent. Both were in the employ of the company. Neither of them, however, exercised any supervisory power over the plaintiff or the work. They simply assisted in the accomplishment of a common object, and were strictly co-employees. *N. Y., L. E. & W. R. R. Co. v. Bell*, 112 Pa. St. 400, 4 Atl. 50; *Hughes v. Leonard*, 199 Pa. St. 123, 48 Atl. 862. What was done by them, or either of them, in the matter of the turning on of the current, could not be regarded as the act of the defendant company, except it be held to be an absolute nondelegable duty of the employer to keep constant watch upon the switch to prevent the current being turned on every time an employee attempts to repair a line. We know of no authority which enforces such obligation. The learned judge directed a nonsuit, which he afterwards refused to remove, on the ground that it nowhere appears in the evidence that either electrician or engineer had charge of the line of switch board, or any particular part of defendant's business, or what, if any, duty was delegated to either. The opinion filed in discharging the rule to take off the nonsuit, amply vindicates the conclusion reached."

In *MILNE v. PROVIDENCE TELEPHONE CO.*, (*Rhode Island*, May, 1909) 72 Atl. 716, the facts are stated in the opinion by BLODGETT, J., as follows:

"Robert Milne, the plaintiff's intestate, was on the 29th of July, 1907, the date of the accident, in the employ of the Pawtucket Electric Company as the assistant foreman of a gang of linemen. This company was engaged in furnishing electricity for light and power. On the date mentioned Milne, with other employees of the company, went to the corner of Weeden and Conant streets, in Pawtucket, to hunt for some trouble on the system, called by linemen a 'live ground.' Upon arriving at the corner aforesaid, Milne and another employee named Foss, went up a pole there. This pole, together with other poles on the same street, belonged to the Providence Telephone Company, the defendant. Both the electric company and the city of Pawtucket had been permitted to place wires upon these poles; but it does not appear that the defendant received any compensation from either of the parties mentioned. So far as appears, these wires were placed upon the poles of the defendant by its permission and simply as a matter of convenience to the other company and the city of Pawtucket. Upon the pole at the corner of Weeden and Conant streets the defendant had a cable box, from which ran a cable. The cable was attached to and extended down the pole. From this same cable box ran a ground wire, which ran down the street side of the pole to the ground and was held in place upon the pole by a series of small staples. Both the cable and the ground wire, before mentioned, were in plain sight of any one who might choose to look for or observe them, and both had been there for some years. The pole near the top was provided with several cross-arms for the accommodation of the different wires, and the wires of the telephone company were above those of the electric company.

"After Milne and Foss had reached a convenient position for that purpose, they cut the high voltage wire belonging to the Pawtucket Electric Company, and after some other employees farther down the line had made some necessary changes or adjustments, which occupied something like three-quarters of an hour, they were notified to again connect up and tape the wire. After the connection had been completed, Milne proceeded to tape the wire; that is, to wind with tape the ends which had previously been stripped of insulation in order to make the connection. While doing this taping, Milne received a shock of electricity which immediately resulted in his death. The uncontradicted testimony is that Milne was burned upon the right thumb and the right foot, and that he must have therefore come in contact with the high voltage wire and some ground wire at the same time, which caused the current to pass through his body. The testimony also shows that he probably came in contact with the ground wire, and thus brought about the passage of the current through his body while he was working upon the high voltage wire. There is also undisputed testimony that Milne was a lineman of experience; that there were two things which every lineman must look out for and avoid, one being a short circuit and the other a ground; and that Milne probably grounded himself by getting his foot in contact with the ground wire, running down the side of the pole, while his hands were in contact with the high voltage wire which he was engaged in taping. The case came on for trial October 15, 1908, before Mr. Justice

Stearns and a jury, and at the conclusion of the plaintiff's testimony the court, on motion, directed the jury to find a verdict for the defendant. The plaintiff has now filed her bill of exceptions to the ruling or decision of the Superior Court, alleging errors in the admission and rejection of certain testimony and in the direction of a verdict for the defendant." * * *

The court reviewed and overruled the exceptions and held that the evidence showed contributory negligence on the part of decedent precluding a recovery.

In *FORT WORTH LIGHT & POWER CO. ET AL. v. MOORE*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 831, the facts are stated in the syllabus to the report in 118 S. W. as follows:

"An experienced lineman in the employ of a telephone company injured, while climbing one of its poles, by placing one hand on a messenger wire, which he knew to be grounded, and the other one on an iron step, in contact with which, as he could have seen, was an electric light wire of the city, which at such time should have been dead, but which was charged through contact, at a distance, with the wire of a third company, owing to its negligence, assumed the risk from the negligence of the telephone company in not keeping the city wire away from the step, it being the rule with such electricians to deal with each wire as if it were charged, and he, though ignorant of the presence of electricity in the city wire, having equal facility with his master for knowing thereof."

The plaintiff filed his suit in the District Court of Tarrant county against the Ft. Worth Light & Power Company, the Southwestern Telegraph & Telephone Company, and the city of Ft. Worth, claiming damages in the sum of \$25,000 for personal injuries alleged to have been sustained by him in July, 1907, while in the service of the Southwestern Telegraph & Telephone Company, and occasioned by certain concurrent acts of negligence on the part of all the defendants. The trial resulted in a verdict in favor of the appellee for the sum of \$4,000, which the jury apportioned as follows: Three thousand dollars against the appellant Southwestern Telegraph & Telephone Company, and \$1,000 against the Ft. Worth Light & Power Company. Separate appeal bonds were executed by each of these defendants, and assignments of error filed in the trial court. The telephone company alone filed briefs in the appeal court.

After reviewing the evidence the court (per HODGES, J.), said:

"We think the evidence very conclusively shows that the appellee was under a greater duty to look out for his own safety in the places he was called upon to work than that which generally rests upon the servant. Whether the act of permitting the electric light wire of the city to remain in contact with the step be regarded as negligence on the part of the telephone company or not, we think it was a situation of which the appellee under the circumstances assumed the risk. He either knew, or should have known, where he was placing his hands, and the wires with which he was likely to come in contact. Such a precaution was not only imposed by what he says was his duty to see that the place in which he was to work was safe, but by ordinary prudence as well.

"Without passing upon any of the other assignments of error, we think

that as to the appellant Southwestern Telegraph & Telephone Company this case should be reversed, and judgment here rendered in its favor. The case is therefore ordered reversed and rendered."

A motion for rehearing overruled. A motion to reform and affirm judgment of the trial court for the full sum of \$4,000 against the defendant, the Ft. Worth Light & Power Company, was also overruled. The ruling on the latter motion is stated in the syllabus to the report in 118 S. W. 831, as follows:

"Though on the verdict plaintiff had a right to a judgment against both defendants, jointly and severally, for all the damages awarded, yet he, not having complained below of its being for part only of the damages against one defendant, and for the balance against the other, may not, on the judgment being reversed as to one defendant, have it reformed so as to be for the full amount against the other defendant, which, though perfecting appeal and filing assignments of error below, filed no brief in the Appellate Court."

Judgment as rendered against the Ft. Worth Light & Power Company affirmed.

In *CO-OPERANT TELEPHONE CO. v. ST. CLAIR*, (U. S. C. C. A., Second Circuit, Vermont, March 1909), 168 Fed. 645, judgment for plaintiff, in an action brought under the New York Statute to recover for the death of Nelson J. St. Clair, a lineman in the employ of defendant, who was killed by coming in contact with a wire or wires carrying a high voltage current, was affirmed. The facts are stated in the opinion by LACOMBE, Circuit Judge, as follows:

"The telephone wires upon which deceased was working carried a current not sufficiently strong to injure him. The wires with which he came in contact belonged to a light and power company and were strung along a street in Whitehall, N. Y., above a line of telephone wires. About two years before the accident, which happened July 27, 1905, the wires of the light company sagged at the locality in question and thus approached the lines of the telephone company. The latter complained to the light company; but, its complaints not being attended to, defendant erected a framework on its pole, extending above its own wires, and on the top of this frame it fastened the light wires. The pole thereafter carried two cross-arms, on which were strung sixteen or seventeen telephone wires. These cross-arms were about twenty inches apart, and above, at a distance variously estimated by the witnesses at from twenty-one inches to two and a half feet, was the top of the framework, carrying five light wires, of which, on the day of the accident, two were carrying current. Deceased was directed to climb the pole and fasten two of the telephone wires, recently strung, to pins on the lower cross-arm near its outer end. He climbed the pole, using spurs, reached and placed his feet on the lower cross-arm, straddled over the wires on the upper cross-arm, and bent down and over to reach the wires he was to fasten. In some way, not clearly indicated, while engaged in that work he straightened up so as to come into contact with the two light wires and received the current which killed him." * * *

The question of assumption of risk was properly for the jury who found that the circumstances of the accident showed an extraordinary danger that was not a part of the risks of employment.

WHEELING & LAKE ERIE RAILROAD COMPANY v. HARVEY.

(No. 9830.)

SWARTS v. AKRON WATER WORKS COMPANY.

(No. 10,114.)

Supreme Court, Ohio, December, 1907.

1. DANGEROUS PREMISES — INVITATION — INJURY TO CHILDREN. — It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation but merely by sufferance (1).
2. DANGEROUS PREMISES — TURNTABLE DOCTRINE. — A railroad company is not liable to an infant who comes upon its premises without invitation, and who is injured there while playing, without its knowledge, with a turntable. The doctrine on the turntable cases is disapproved (2).
(*Harriman v. Pitts. C. C. & St. L. R. Co.*, 45 Ohio St. 11, 12 N. E. 451, distinguished).
3. DANGEROUS PREMISES — CHILD DROWNED IN RESERVOIR — ATTRACTION TO CHILDREN — OWNER OF LAND NOT LIABLE. — A water works company is not liable for the death by drowning, of an infant which comes upon its land without invitation, and there falls into a reservoir or basin of water while playing about it, without the knowledge of the company (3).
(*Syllabus by the Court.*)

ERROR to Circuit Court, Portage County.

ERROR to Circuit Court, Summit County.

ACTION by one Harvey against the Wheeling & Lake Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Action by one Swarts against the Akron Water Works Company. Judgment for plaintiff was reversed by the Circuit Court, and

1. *Dangerous premises — Attraction to children.* — For cases involving the liability of landowners and others for injuries to children, see Vols. 1-20 AM. NEG. REP., (1897-1907). See also AMERICAN NEGLIGENCE DIGEST (1909 edition), title INFANTS (ATTRACTION TO CHILDREN).

2. *"Turntable cases."* — See numerous cases from 1897 to 1907, reported

in Vols. 1-20 AM. NEG. REP.; also NOTE ON LIABILITY OF RAILROAD COMPANIES FOR ACCIDENTS TO CHILDREN ON TURNTABLES, 9 AM. NEG. REP. 611-616; also the AMERICAN NEGLIGENCE DIGEST (1909 edition), title TURNTABLE.

3. See Notes of cases of various accidents to children caused by dangerous attractions, at end of this case,

plaintiff brings error. Judgment in the first case *reversed*, and in the second case *affirmed*.

"In the village of Kent the Wheeling & Lake Erie Railroad Company has a railroad yard in the outskirts of the village. The right of way at that point is uninclosed and is 140 feet in width, the tracks are located in a cut ten or twelve feet in depth, and the land on both sides is that much higher than the right of way. There are four tracks, and between the center track is a sixty-foot turntable. About 800 feet east and the same distance west from the turntable the right of way is crossed by public streets. The turntable was not locked, but was fastened by an iron brake shoe, weighing not less than ten pounds, that was laid in a slot and that could be lifted out, and the turntable then could be revolved. Just before the 4th of July, in the year 1904, two boys, one aged thirteen and the other ten, while on their way to a car repairer's shanty located on the railroad's right of way to get a piece of iron to make 'something' for the Fourth of July, met the plaintiff's infant, a boy between five and six years of age, who wished to go with them, and although not invited to do so, he yielded to his childish instincts and followed them down one of the streets to the right of way and along the tracks, past the turntable, to the repairman's shanty. The repairman was not at the shanty; but the boys found what they thought would answer their purpose, and started to return to the village, over the same course they had covered in going to the shanty. When they reached the place where the turntable was, they stopped to play with it. One of the older boys moved the fastening and revolved the turntable and the little boy, who was sitting upon the turntable with his left leg hanging down over one end, was caught between the end of the table and the head block and lost his leg. It appears from the testimony of quite a number of boys that they had at different times played with the turntable, and also that they were driven away from the turntable whenever they were seen by any of the employees of the railroad company while so engaged. And it seems to have been generally known by the boys that they were not at liberty to play with the turntable. The only evidence tending to prove knowledge on the part of the railroad company, if it does so tend, that boys were playing with the turntable is the testimony of the boys that they did play with it; that they had been driven away by employees of the company; and the testimony of the yard clerk, at one time in the employ of the company, that he had on several occasions stopped boys from playing with the turntable, and that on one occasion he had reported the

fact to the station agent. In the petition it is averred that the turntable was located in the village, and at a place that was uninclosed and easily accessible to children, and that it was peculiarly attractive to children and calculated to entice them to play with it, and that when set in motion, which could easily be done even by children, was a source of latent danger to them, and that it was left unguarded, unfastened, and unlocked, although at slight expense and trouble it could have been made fast while not in use; that the railroad company knew that the children were wont to play with the turntable, and that it knew or ought to have known of the danger to them. At the close of plaintiff's evidence, and again at the close of all of the evidence, the defendant requested the court to direct a verdict in its favor. The plaintiff recovered a judgment for \$6,000, which on error was affirmed by the Circuit Court.

"In the second case, briefly stated, the facts are: On Sherbondy Hill, in the city of Akron, the defendant company maintained a reservoir about fifteen feet in depth. The banks on the inside were precipitous, and the water about eight feet in depth. When constructed, about twenty-five years ago, it was located on a tract of about ten acres outside of the corporate limits of the city, but by the extension of the corporate limits in the year 1900, about one-half of it was comprised within the limits of the city. This ten acre tract was not converted into a park but it was covered with trees and bushes, and, excepting the reservoir, was left very much in its natural state. The basin was about 250 feet from the nearest public road. From this public road the company had constructed a rough road or driveway to and around the reservoir for its own use. It also had inclosed the basin with a picket fence about three feet high. The evidence tends to prove that people, including children, resorted to these premises for the view from the hill, or for their own pleasure as is not unusual on unimproved tracts of land so near a city. Late in May, in the year 1903, plaintiff's decedent, Calibel Georgia Bush, a child nine years of age, together with her sister aged eleven, and another girl aged about twelve, were permitted by their parents to take their luncheon and to go to the woods in the vicinity of these premises to picnic. After arriving at the woods, and having spent several hours there in strolling about, they discovered the reservoir. Two pickets were off of the fence, leaving an opening eight and a half inches in width. Through this opening they crawled, and stood and sat upon the bank for a few minutes, when the youngest fell into the reservoir and was drowned. It appears that a few weeks before this the gate in the

picket fence was down, and a little boy, a son of one of the defendant's employees, fell into the reservoir and that this accident had been brought to the notice of the company, and that prior to the accident in the present case the gate had been nailed up. Plaintiff recovered a judgment for \$1,100, on the ground of the defendant's negligence, and the Circuit Court reversed for error in overruling the motion of the defendant to direct a verdict at the close of the plaintiff's testimony, and entered a judgment dismissing the petition."

SQUIRE, SANDERS & DEMPSEY, for plaintiff in error, Wheeling & Lake Erie Railroad Company.

W. J. BECKLEY, for defendant in error, Harvey.

MUSSER, KOHLER & MOTTINGER and GRANT & SIEBER, for plaintiff in error, Swarts.

ALLEN, WATERS & ANDRESS, for defendant in error, Akron Water Works Company.

SUMMERS, J. (after stating the facts as above).—The railroad company is not answerable in damages for the loss of the little boy's leg, unless his injury was caused by the neglect by the railroad company of some duty it owed to the boy, and the water works company is not answerable in damages for the death of the little girl, unless she lost her life because the employees of the company neglected to observe some duty that it owed to her. Whether any and what duty rested upon the defendant is a question of law; whether the defendant performed or observed that duty, or neglected to do so, and plaintiff in consequence was injured, is a question of fact. The duty of the owner or occupier of land to persons coming upon it depends somewhat upon whether they are there by his invitation or permission. To invited persons it is his duty to exercise reasonable care for their safety. To licensees it is his duty to give notice of hidden dangers or traps. While trespassers, that is persons entering without permission, assume the risk of injury from the condition of the premises, and the duty of the occupier to them is only to be careful not to injure them by bringing force to bear upon them. The only exception to his nonliability to persons entering without his permission was where he made a change in the condition of his land, adjacent to a public highway, so as to endanger the safety of travelers who might, without fault on their part, accidentally stray from the highway.

So the law stood until the decision in the *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. (U. S.) 657, (9 Am. Neg. Rep. 614, with notes of numerous turntable cases) decided in 1874. In that case

a little boy, about six years of age, lost his foot while playing with a turntable on the unclosed lands of the railroad company in company with two other boys, and a judgment for \$7,500 was sustained. This case was tried before Dillon, Circuit Judge, and Dundy, District Judge. The Circuit Judge charged the jury as follows: "This action rests, and rests alone, upon the alleged negligence of the defendant, and this negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation. If the turntable in the manner it was constructed and left, was not dangerous in its nature, then of course the defendants would not be guilty of any negligence in not locking or guarding it. But even if it was dangerous in its nature in some situations, you are further to consider whether, situated as it was on the defendant's property, in a small town, and distant or somewhat remote from habitation, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue. The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence."

This charge, in the Supreme Court, was held to be a correct statement of the law. In many of the States the courts have followed the lead of the Supreme Court of the United States, and a multitude of cases has arisen seeking to make the owners of property liable for injuries to children from accidents happening upon their premises, on the ground that the owner was negligent in not anticipating that children would be likely to be attracted to the

place and to be injured. The multitude of circumstances under which the owner of property would be liable for injuries to children, and the very serious burden which was, in consequence, being placed on the owners of property, were very probably not foreseen in the Stout Case. But the cases became so numerous as to occasion very careful examination of the principles laid down in that case. In many jurisdictions the correctness of the conclusion there reached is denied, and in some of the States where that decision was followed the courts have repudiated the doctrine, in others they have limited it, and in still others they have declined to follow the doctrine in any case excepting a turntable case. To even enumerate the cases in which the so-called turntable doctrine has been applied or denied would require so much space as to preclude its attempt.

The following are "turntable cases" in which the doctrine is applied: *United States*: *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall 657, 9 Am. Neg. Rep. 614; *Minnesota*: *Keffe v. Milwaukee & P. Ry. Co.*, 21 Minn. 207, 9 Am. Neg. Rep. 613; *O'Malley, Adm'r, v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 440, 9 Am. Neg. Rep. 613; *Nebraska*: *A. & N. E. R. Co. v. Bailey, Adm'r*, 11 Neb. 332, 9 N. W. 50, 9 Am. Neg. Rep. 613; *Missouri*: *Koons v. St. Louis & I. M. R. R. Co.*, 65 Mo. 592, 9 Am. Neg. 614; *Nagel v. Mo. Pac. Ry. Co.*, 75 Mo. 653, 9 Am. Neg. Rep. 614; *Kansas*: *Kansas Cent. Ry. Co. v. Fitzsimmons*, 22 Kan. 686, 9 Am. Neg. Rep. 613; *Union Pac. Ry. Co. v. Dunden*, 37 Kan. 1. 14 Pac. 501, 9 Am. Neg. Rep. 613; *Iowa*: *Edgington v. Burlington, C. R. & N. Ry. Co.*, 116 Iowa 410, 12 Am. Neg. Rep. 27, 90 N. W. 95; *California*: *Barrett v. So. Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 9 Am. Neg. Rep. 611; *Washington*: *Ilwaco Ry. & Navigation Co. v. Hedrick, Adm'r*, 1 Wash. St. 446, 25 Pac. 335, 9 Am. Neg. Rep. 611; *Tennessee*: *Bates v. Railway Co.*, 90 Tenn. 36, 15 S. W. 1069, 9 Am. Neg. Rep. 614. But railway company is not required to fasten the turntable any more securely than necessary to keep it securely in place. *Illinois*: *St. Louis, V. & T. H. R. R. Co. v. Bell*, 81 Ill. 76 (judgment reversed on the sole ground that the company was not negligent in view of the isolated position of the turntable); *South Carolina*: *Bridger v. A. & S. R. R. Co.*, 25 S. C. 24, 9 Am. Neg. Rep. 614; *Georgia*: *Ferguson v. Columbus & Rome Ry.*, 75 Ga. 637, 9 Am. Neg. Rep. 612; *Texas*: *Evansich v. G. C. & S. F. Ry. Co.*, 57 Tex. 126, 9 Am. Neg. Rep. 614; *G. C. & S. F. Ry. Co. v. McWhirter*, 77 Tex. 356, 14 S. W. 26; *Ft. Worth & Denver City Ry. Co. v. Measles*, 81 Tex. 474, 17 S. W. 124. To these should be added

Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619. This was not a turntable case, but a case in which a boy was injured in a slack pit of the railroad company. However, the doctrine of the turntable cases was re-examined and approved.

In the following cases, in which the injuries were received at a turntable, the doctrine of the turntable cases is denied: *New Hampshire*: *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 9 Atl. 790, 9 Am. Neg. Rep. 615; *Massachusetts*: *Daniels v. N. Y. & N. E. R. R. Co.*, 154 Mass. 349, 28 N. E. 283, 9 Am. Neg. Rep. 615, 616; *New York*: *Walsh v. Fitchburg R. R. Co.*, 145 N. Y. 301, 39 N. E. 1068; *New Jersey*: *Turess v. N. Y. Susq. & West. R. Co.*, 61 N. J. Law, 314, 4 Am. Neg. Rep. 520, 40 Atl. 614; *Del.*, *L. & W. R. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 4 Am. Neg. Rep. 522; *Virginia*: *Walker's, Adm'r, v. Potomac, etc., R. Co.*, 105 Va. 226, 53 S. E. 113, 20 Am. Neg. Rep. 221.

In the following cases, where the injuries were not sustained at a turntable, the doctrine of the turntable cases is denied; *New Jersey*: *Friedman v. Snare & Triest Co.*, 71 N. J. Law, 605, 61 Atl. 401; *Michigan*: *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 12 Am. Neg. Rep. 566; *Rhode Island*: *Paolino v. McKendall*, 24 R. I. 452, 53 Atl. 268, 12 Am. Neg. Rep. 550; *West Virginia*: *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 12 Am. Neg. Rep. 567.

In the following cases, in which children were injured, but not while playing with a turntable, liability is denied in courts that have adopted the turntable doctrine in cases where the injuries were received at a turntable: *Minnesota*: *Emerson v. Peterler*, 35 Minn. 481, 29 N. E. 311; *Twist v. Railroad Co.*, 39 Minn. 164, 39 N. W. 402; *Haesley, Adm'r, v. Railroad Co.*, 46 Minn. 233, 48 N. W. 1023; *Dehanitz v. City of St. Paul*, 73 Minn. 385, 76 N. W. 48, 4 Am. Neg. Rep. 655; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Stendal v. Boyd*, 67 Minn. 279, 69 N. W. 899; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735; *Erickson v. Great Northern Ry. Co.*, 82 Minn. 60, 84 N. W. 462, 11 Am. Neg. Rep. 496; *Georgia*: *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 10 Am. Neg. Rep. 8; *O'Connor v. Brucker*, 117 Ga. 451, 43 S. E. 731, 13 Am. Neg. Rep. 500; *Nebraska*: *Richards, Adm'r, v. Connell*, 45 Neb. 467, 63 N. W. 915; *City of Omaha v. Bowman, Adm'r*, 52 Neb. 293, 72 N. W. 316, 11 Am. Neg. Rep. 47; *California*: *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 1 Am. Neg. Rep. 4; *Missouri*: *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069; *Witte v. Stifel*, 126 Mo. 295, 28

S. W. 891; *Arnold v. City of St. Louis*, 152 Mo. 173, 53 S. W. 900; *Kansas: Railroad Co. v. Bockoven*, Adm'r, 53 Kan. 279, 36 Pac. 322; *Texas: Dobbins v. M., K. & T. Ry. Co.*, 91 Tex. 60, 41 S. W. 62; *Tennessee: Stone Co. v. Pugh*, 115 Tenn. 688, 91 S. W. 199; *Washington: Clark v. Northern Pac. Ry. Co.*, 29 Wash. 139, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955; *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537.

The principles involved have been carefully considered in so many cases that it would be fruitless as well as presumptuous to undertake to add anything to the discussion. In the recent case, *Friedman v. Snare & Triest Co.*, 71 N. J. Law, 605, 61 Atl. 401 (4), where the court denied liability for injuries to a little girl between four and five years of age who had been injured while playing upon some iron girders that fell upon her while playing upon them in the street, where they had been placed by an abutting property owner for use in the construction of a building, the English cases that are cited as supporting the decision in *Sioux City & Pac. R. Co. v. Stout*, 17 Wall, (U. S.) 657, 9 Am. Neg. Rep. 614, are reviewed. And in *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 12 Am. Neg. Rep. 566, many of the cases, both English and American, are examined, and the doctrine of the turntable cases is expressly disapproved. In that case the defendant owned a small pumphouse, located upon ground owned by a railroad company. In the house was a small, overshot waterwheel. The plaintiff, a girl about twelve or thirteen years of age, was in the habit of passing this pumphouse on the way to school with her brothers and sisters; going across lots through the field, because it was nearer. For some time previous to the time of the accident a hole existed in the stone wall of the house inclosing the wheel, through which the children went to play on the wheel. On the day in question the brothers of plaintiff, on the way from school, crawled through this hole, and, mounting the wheel, were able by their weight to turn the wheel part way round and back. A younger sister, aged eight years, got caught between the wheel and the wheel pit. The plaintiff heard her screams, and went through the hole to her succor, and aided in rescuing her, and was herself injured. In the opinion, Hooker, J., after reviewing a

4. See the decision in this case in the United States Circuit Court of Appeals, Third Circuit, February, 1900, 169 Fed. 1, which affirmed the *Friedman* case in 71 N. J. Law, 605,

61 Atl. 401. The appeal, *SNARE & TRIEST CO. v. FRIEDMAN*, 169 Fed. 1, is the case next reported in this vol. of AM. NEG. REP.

number of turntable cases, says: "Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawn mower, or a spade upon his lawn; a rake, with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barnyard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse, or a cow with calf — does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stables are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plough, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond? And must he guard ravines and precipices upon his land? Such is the evolution of the law, less than thirty years after the decision of *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657, (9 Am. Neg. Rep. 614) when, with due deference, we think some of the courts left the solid ground to the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon." Of the case of *Powers v. Harlow*, 53 Mich. 597, 19 N. W. 257, 9 Am. Neg. Rep. 611, in which the opinion is by Judge Cooley, and which is quoted from at some length in *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, as approving the turntable doctrine, he says: "Clearly this does not adopt the rule of *Railroad Co. v. Stout*." And in conclusion he says: "That a landowner is under no obligation to use care to protect a trespasser is a broad, and until recently, undisputed rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained to-day by the great weight of authority. It is contended by some law writers, and has been in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the

reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Atterton*, L. R. 1 Exch. 239, that a four-year-old boy was a trespasser, under the circumstances of that case; and there are numerous cases cited in this opinion where liability is denied upon that and no other ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that in cases involving turntables a majority of the cases, which are necessarily few, have followed the case of *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657 (9 Am. Neg. Rep. 614); but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen. Others have asserted different reasons for following it. One gives us to understand that a child is licensed to go wherever he can find that which attracts him. A Texas court has held that children of tender years cannot be trespassers; while other authorities are content to rest their approbation of the adherence to the alleged rule upon the inhumanity of the doctrine that a landowner must not be held responsible for injuries suffered by trespassing children, when by ordinary thoughtfulness and care he could have anticipated and prevented it, and the generic term 'attractive nuisances' is applied to the great variety of things which may naturally be expected to allure young children upon private premises. The term 'attractive nuisances,' as applied, is a new one in the books, and the plausible application of the well-known principle that one must so occupy his own as not to do harm to the rights of others should not be construed to so restrict the use of private land as to make it necessary to guard and protect trespassers. A man's home has always been considered his castle—a domain, where, secure from intrusion, he might lawfully do as he would, so long as he did not interfere with the legal rights of others. It has been his duty to guard those licensed to enter, but beyond that he has not been required to go. In our anxiety to prevent personal injuries, we should not go so far as to overturn private rights."

In *Gillespie v. McGowan*, 100 Pa. St. 44, Paxson, J., says that the principle upon which it is sought to fasten liability on property owners would, if carried to its logical conclusion, "charge the duty of protection of children upon every member of a community except their parents." In a very able article on the "liability of landowners to children entering without permission," by Judge

Jeremiah Smith, in 2 *Harvard Law Review*, 349-372, he says: "If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, that may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case every landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damages arising from the want of such a playground."

In some of the cases it is said that *Lynch v. Nurdin*, 1 *Adol. & El.* 29, has been overruled or at least disapproved; but in *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 *Sup. Ct.* 619, Mr. Justice Harlan doubts the correctness of this statement and refers to an English case in which it has been approved, and we may add that since then it has been allowed in *Harrold v. Watney*, 1898) 2 *Q. B.* 320, and in *McDowell v. G. W. Ry. Co.*, (1902) 1 *K. B.* 618. However, we do not consider the case of *Lynch v. Nurdin* an authority for the decision in *Sioux City & Pac. R. Co. v. Stout*, 17 *Wall.* 657. In *Lynch v. Nurdin*, 1 *Ad. & E.* 29, the defendant left his horse and cart unattended in a public street. The plaintiff, a child seven years of age, got upon the cart in play and another child led the horse on, and the plaintiff was thereby thrown down and hurt. The plaintiff recovered. It is to be observed that the horse and cart were left in the street. It was the duty of defendant to use care. The child was rightfully in the street, and the fact that he meddled with the cart was not contributory negligence in one of his age, and it is not properly a case of trespass. In the turntable cases there is neither invitation or permission, and to ground them on cases like *Townsend v. Wathen*, 9 *East*, 277, where dogs were lured to death by tainted meat, or like *Bird v. Holbrook*, 4 *Bing.* 628, where a spring gun was set to shoot trespassers, is to lose sight of the difference between negligence and intentional wrongdoing. The distinction is pointed out in *Pointing v. Noakes*, (1894) 2 *Q. B.* 281, where the defendant was held not liable for the death of plaintiff's horse, due to the latter's eating from a yew tree that was wholly on defendant's land.

In *Buch v. Amory Mfg. Co.*, 69 *N. H.* 257, 44 *Atl.* 809, where a boy, eight years of age, unable to speak or understand English, was injured by machinery, in a very able opinion *Carpenter, C. J.*, says: "Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owe to the plaintiff a legal duty which they neglected to perform. With purely moral obligations the law does not deal. For example, the priest and Levite who

passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves which they might and morally ought to have prevented or relieved. Suppose A. standing close by a railroad, sees a two-year-old babe on the track and a car approaching. He can easily rescue the child with entire safety to himself, and the instincts of humanity require him to do so. If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death. Pub. St. 1901, c. 278, § 8. 'In dealing with cases which involve injuries to children, courts * * * have sometimes strangely confounded legal obligations with sentiments that are independent of law.' *Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155. 'It is important to bear in mind, in actions for injuries to children a very simple and fundamental fact, which in this class of cases is sometimes strangely lost sight of, viz., that no action arises without a breach of duty.' 2 Thomp. Neg. 1183, note 3. 'No action will lie against a spiteful man, who, seeing another running into danger, merely omits to warn him. To bring the case within the category of actionable negligence some wrongful act must be shown, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held answerable for not protecting them against any danger they might encounter whilst using the license.' *Gautret, Adm'x, v. Egerton*, L. R. 2 C. P. 371, 375. What duties do the owners owe to a trespasser upon their premises? They may eject him, using force and such only as is necessary for the purpose. They are bound to abstain from any other or further intentional or negligent acts of personal violence; bound to inflict upon him by means of their own active intervention no injury which by due care they can avoid. They are not bound to warn him against hidden or secret dangers arising from the condition of the premises (*Redigan v. B. & M. R. R.* 155 Mass. 44, 47, 48, 9 Am. Neg. Cas. 439n, 28 N. E. 1138), or to protect him against any injury that may arise from his own acts or those of other persons. In short, if they do nothing, let him entirely alone, in no manner interfere with him, he can have no cause of action against them for any injury that he may receive. On the contrary, he is liable to them for, any damage that he by his unlawful meddling may cause them or their property. What greater or other legal obligations was cast upon these defendants by the circumstances that the plaintiff was, as is assumed, an irresponsible infant? If the landowners are not bound to warn an adult trespasser of hidden dangers — dangers

which he by ordinary care cannot discover, and therefore cannot avoid — on what ground can it be claimed that they must warn an infant of open and visible dangers which he is unable to appreciate? No legal distinction is perceived between the duties of the owners in one case and the other. The situation of the adult in front of secret dangers which by no degree of care he can discover, and that of the infant incapable of comprehending danger, is in a legal aspect exactly the same. There is no apparent reason for holding that any greater or other duty rests upon the owners in one case than in the other. There is a wide difference—a broad gulf—both in reason and in law, between causing and preventing an injury; between doing by negligence or otherwise a wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A. sees an eight-year-old boy beginning to climb into his garden over a wall stuck with spikes, and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? *Degg, Adm'x, v. Railway Co., 1 H. & N. 773, 777.* I see my neighbor's two-year-old babe in dangerous proximity to the machinery in his windmill in his yard, and easily might, but do not rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by the common law or under the statute (Pub. St. 1901, c. 278, § 8), because the child and I are strangers, and I am under no legal duty to protect him. Now, suppose I see the same child trespassing in my own yard and meddling in like manner with the dangerous machinery of my own windmill; what additional obligation is cast upon me by reason of the child's trespass? The mere fact that the child is unable to take care of himself does not impose on me the legal duty of protecting him in one case more than in the other. Upon what principle of law can an infant by coming unlawfully upon my premises impose upon me the legal duty of a guardian? None has been suggested, and we know of none."

The real reason for implying invitation, or declaring a turntable to be a lure, is to escape the imputation of making the law, rather than declaring it. Railroad companies do lock their switches, because unlocked they endanger the property of the company and the lives of its passengers; but, assuming that there is no reason why a switch should be kept locked for safety when not in use, and a turntable should be left unlocked when not in use, endangering the lives of little children, excepting that in the one case there is a pecuniary liability and in the other not, that does not vest the courts with the legislative function to impose the duty upon railroad companies. It is much better that the duty should be prescribed by the Legislature rather than be declared by the courts, for then it may be known in advance of liability, and the courts will be saved the expense and difficulty of explaining to disappointed litigants, in cases based upon a different state of facts but logically requiring the same result, why they are mistaken. Thus, in *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 12 Am. Neg. Rep. 566, the cases are cited in which it is held that a railroad company does not owe to children the duty to see that they do not jump upon its cars, or to keep its cars in good repair, or the doors shut, or to guard them so that children cannot be injured by loosening the brakes, or not to leave a hand car near the track, to keep a lookout for them when trespassing. To which may be added *Dicken v. Coal Co.*, 41 W. Va. 511, 23 S. E. 582, in which a recovery was denied for the injury of a little child, crippled by a car while on a tramroad of a salt company; *Clark, Adm'r, v. Manchester*, 62 N. H. 577, where a child of four years was drowned in a reservoir that had once been used by the city, but had been abandoned, the fence removed, though a portion of it yet had water in it, and there was a field nearby where ball playing and other games went on and children were accustomed to play, the child while passing along a path at the reservoir fell into it; *Grindley, Jr., Adm'r, v. McKechnie*, 163 Mass. 494, 40 N. E. 764, where a child went through an opening in a fence along a path, and fell into a sewer owned by the city; *Gay, Adm'r, v. Railway Co.*, 159 Mass. 238, 34 N. E. 186, where liability was denied to a boy ten years old, who went on a car unlawfully standing in a street and was injured by a recoiling brake not properly fastened; *Talty, Adm'r, v. City of Atlantic*, 92 Iowa, 135, 60 N. W. 516, where a child was injured while digging sand, a bank caving in upon him; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965, where a child of three years, playing in a pit in an unguarded vacant lot, was killed by the caving of the bank, and in this case

children were attracted by the bank and were accustomed to play there; *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069, where children went to play in an unfenced railroad yard, and one of them, six years of age, was injured in jumping on a train; *Vanderbeck v. Hendry*, 34 N. J. Law, 467, 16 Am. Neg. Cas. 665n, where defendant owned a lumber yard in a populous part of the city, frequented by children, and a child was injured by the falling of a pile of lumber not in a safe condition; *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, where a child six years of age walked on a wall along the street and fell into a pit; *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 12 Am. Neg. Rep. 567, 40 S. E. 410, where a boy seven years of age trespassed upon the property of a coal company and was injured by a pulley and cable used by the company to haul cars from its mines to the tippie; *Harbina v. Twin City General Electric Co.*, (Mich.) 113 N. W. 586, where a little girl nine years of age, while crossing the unclosed lands of the defendant, fell into a ditch filled with hot water.

But it is said that the case of *Harriman v. Pitts.*, C. C. & St. L. R. R. Co., 45 Ohio St. 11, 12 N. E. 451, applies the doctrine of the turntable cases and that ever since, for twenty years, the decision in that case has been considered by the profession as committing this court to that doctrine. If true, that would not make the doctrine a rule of property, but would entitle the case only to the same consideration that is given any other considered judgment of the court. The decision in that case did not require the application of the doctrine of the turntable cases, but rests upon long-settled principles of law. There, some boys, walking along the tracks of a railroad, found an unexploded torpedo, and, when trying to open it, in ignorance of its dangerous character, it exploded and seriously injured one of their number. The case was disposed of on a demurrer to the petition. The boys were held to be licensees, and being licensees, it was the duty of the company to warn them of the hidden peril, or to use care that they were not injured thereby. In the opinion, p. 31, Williams, J., says: "Hence where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road, at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons so using its road; and it is negligence for the servants of such company to knowingly in-

terpose any new danger without reasonable precaution against injury therefrom." In the present case, unlike *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451, the facts do not make a case, if not of implied invitation, at least one in which the defendant may be said to be estopped to deny permission. Assuming, then, but not deciding, that the plaintiff was a licensee, the turntable was not a hidden peril or trap, as those terms are understood in law. The turntable was not visible from the streets, and the boys were not by it attracted or lured onto the railroad company's property, and the company legally is no more responsible for the injuries received by the boy in meddling with the turntable than it would have been had they been sustained by him in meddling with any other of its appliances.

In the case of *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451, it was not necessary to a determination of the question presented to determine whether the boy was on the railroad company's property by implied invitation, or by license. It may be, as intimated in the opinion, that the conduct of the company estopped it to deny liability or to assert that the boy was a trespasser; but it was not necessary to go further, for in either case it was the duty of the company not to interpose a trap or pitfall, or a new danger, without notice or the exercise of due care. Upon this ground the judgment in that case may be vindicated, but we are not satisfied that what is there said upon the subject of invitation and license can be.

In *Sturgis v. Detroit, G. H. & M. Ry. Co.*, 72 Mich. 619, 40 N. W. 914, 12 Am. Neg. Cas. 117n, Campbell, J., says: "It is impracticable to keep off trespassers from an open track, and all who go upon it do so at their own risk of such dangers as are incident directly to such use." And in *Hargreaves v. Deacon*, Adm'r. 25 Mich. 1, a case in which a boy was drowned in an uncovered cistern on private premises, he says: "Cases are quite numerous in which the same questions have arisen in this case, and we have found none which hold that an accident from negligence on private premises can be made the ground of damages unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission from curiosity or motives of private convenience, in no way

connected with business or other relations with the occupant." And in *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 12 Am. Neg. Rep. 566, it is expressly ruled that: "An invitation or a license to cross the premises of another cannot be predicated on the mere fact that no steps have been taken to interfere with such practice," and that: "There is no difference between children and adults as to the circumstances that will warrant the inference of an invitation or a license to enter upon another's premises."

In *Turess v. N. Y. S. & W. R. R. Co.*, 61 N. J. Law, 314, 4 Am. Neg. Rep. 520, 40 Atl. 614, Magie, C. J., says: "Invitation which creates such a relation may be express, as when the owner or occupier of land, by words, invites another to come on it or make use of it or something thereon; or it may be implied, as when such owner or occupier by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used. This definition, originally given in *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368, 12 Am. Neg. Cas. 75, was approved and adopted by our court of errors, *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl. 478, 16 Am. Neg. Cas. 701, 702. It will be observed that in the case of an implied invitation the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim the relation only when he is justified by the acts or conduct of the owner or occupier in believing that such use was intended. And entry and use by such invitation are thus distinguished from entry and use by mere permission."

And in *Del., L. & W. R. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 4 Am. Neg. Rep. 522, in the Court of Errors and Appeals, Gummere, J., says: "The viciousness of the reasoning which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind, is in effect, an invitation. Such an assumption is not warranted. As was said by Mr. Justice Holmes, in *Holbrook v. Aldrich*, 168 Mass. 16, 1 Am. Neg. Rep. 451, 46 N. E. 115, 'temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the tempta-

tion to untrained minds to infringe them might have been foreseen."

SWARTS v. AKRON WATER WORKS COMPANY: This case owes its existence to the doctrine of the turntable cases, and might be disposed of without further consideration upon the ruling in the preceding case; but, since it is illustrative of the consequence of adopting the turntable doctrine, it may excuse an extension of this already too lengthy opinion. Counsel for plaintiff say: "A great deal was said in the argument below, and doubtless will be said here, in regard to the so-called turntable cases." The insistence that the doctrine of the so-called class of cases shall not be extended has at last reached the point of demanding that a real turntable shall be shown in any case as the best and only evidence that the principle is to be applied. We are contending, not for a name, but for a principle. We cannot produce at the bar a turntable; but if the evidence in this record tends to show that the defendant maintained an "attractive danger," a corresponding obligation arose to reasonably safeguard it against the consequences to be apprehended from it to children who might be attracted by and to it. The doctrine thus allowed and recognized by this court as applicable in a proper case we expect will be adhered to in any case falling within the principle, whether the instrument of danger be a turntable or a reservoir of water. And again: "It must be confessed here that the case from which the above quotation is made is a 'turntable' case, and that we are unable to make profert of a turntable in open court; nor can we produce a torpedo to make our position square with *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451; but our controversy is careless of names, and deals with principles alone. The particular principle for which we are quarreling — and we venture to restate it at the risk of being thought tedious, rather than leave any room for doubt as to where we stand — is this: 'Where the owner of dangerous premises knows or should know that children so young as to be ignorant of the danger will resort to such premises, he is bound to take all reasonable precaution to keep them from the premises, or to protect them from the dangerous condition of the premises,' and this equally whether the danger lurks in a machine or invites approach to a body of water; and that the question of whether the duty thus cast upon the owner has been discharged is one of fact in this case."

In the very able article in 2 *Harvard Law Review*, 349, 434. Judge Jeremiah Smith reviews all of the cases, and reaches the conclusion

that the doctrine of the turntable cases is not sound. He regards the opinion in *Keffe v. Milwaukee, etc., Ry. Co.*, 21 Minn. 207, (9 Am. Nep. Rep. 613ⁿ.) as the ablest in support of that doctrine, and it may be, therefore, interesting to note, that in the subsequent case, *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, that court, by its Chief Justice, in a case where liability is denied for the drowning of a little boy in a dangerous excavation filled with water on a city lot, says: "The doctrine of the turntable cases is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises. If the exception is to be extended to this case, then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child proof. If the owner must guard an artificial pond on his premises, so as to prevent injury to children who may be attracted to it, he must, on the same principle, guard a natural pond; and, if the latter, why not a brook or creek, for all water is equally alluring to children? If he must fence in his stone quarry after it fills with water, so that children cannot reach it — a well-nigh impossible task — why should he not be required to do it before, for a stone quarry, with its steep and irregular sides, might well be an attractive and dangerous place to children? It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery." And in conclusion he says: "Upon the undisputed facts in this case, we hold that plaintiff cannot recover, for the reason and upon the ground that a landowner is not bound to fence or otherwise guard an open excavation or pond, natural or artificial, on his land, so as to prevent injury to children coming thereon without right or invitation, express or implied, although they are induced so to do by the alluring attractiveness of such excavation or pond." In *Erickson v. Great Northern Ry. Co.*, 82 Minn. 60, 11 Am. Neg. Rep. 496, 84 N. W. 462, liability was denied in a case where a child four years of age was attracted by a fire on the unfenced right of way of the railway company near the public streets, and while playing about the fire was burned so that she died. Start, C. J., in that case, says: "The manifest trend of all the decisions of this court is to limit its application to attractive and dangerous machinery, and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine ought to be extended; but we do hold that as a general rule the doctrine of the turntable cases must be limited to cases of attractive and dangerous

machinery, and to other similar cases where the danger is latent. This rule may not be strictly logical, but it is a necessary one, unless landowners are to be made insurers of the safety of the children when trespassing upon their premises." In *Mattson v. Minnesota, etc., R. R. Co.*, 95 Minn. 477, 18 Am. Neg. Rep. 511, 104 N. W. 433, the doctrine was extended to a case in which the defendant had left exposed and unguarded on its premises a large quantity of dynamite which was found by the plaintiff's children, and in an explosion of which one of them was killed and the other permanently injured. In *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 36 S. W. 659, liability is denied for the death by drowning of a boy nine years of age in a pond which was created by excavations in quarrying rock. Liability is also denied in *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, where a boy eight years of age was drowned in a pond on a lot in the city of St. Louis. In *Peters v. Bowman*, 115 Cal. 345, 1 Am. Neg. Rep. 4, 47 Pac. 113, 598, liability is denied for the drowning of a boy eleven years of age, in a pond on a city lot. In *Richards, Adm'r, v. Connell*, 45 Neb. 467, 63 N. W. 915, liability is denied in the case of the drowning of an infant child in a pond on land in the vicinity of a public school. In *Hargreaves v. Deacon*, 25 Mich. 1, where a child fell into an uncovered cistern and was drowned, liability was denied. In *Klix, Adm'r, v. Nieman*, 68 Wis. 271, 32 N. W. 223, liability was denied in a case where a child nine years of age was drowned in an unfenced pond on a lot in the city of Milwaukee. In *Gillespie v. McGowan*, 100 Pa. St. 144, liability was denied in a case where a child eight years of age fell into an abandoned and unguarded cistern or well. And in *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993, liability was denied in a case where a child less than five years of age was drowned in a reservoir maintained by the city to furnish water for public use. In the opinion, Brannon, C. J., says: "There can be no negligence charged upon a person, unless he rests under a duty to the person complaining of damages at his hands; for if there is no duty violated, though there may be grave damages befalling the complaining party, he has no ground of action. It is a case denominated in the law as '*damnum absque*' — damage done, but without violation of a right in the injured party — a misfortune unaccompanied by a breach of duty by the party inflicting the injury. Shearm. & Redf. Neg. § 8. The reservoir and the land containing it were the private property of the city, used, not as a park or place of public resort or common, but only for reservoir purposes. The child was a trespasser, if you can say a child can be a trespasser.

It was a trespasser in legal sense; that is, it was on this property without right. The city was not bound to watch it. It could not be liable to it only for wilful or wanton injury."

In this court, in *Ann Arbor R. Co. v. Kinz*, 68 Ohio St. 210, 67 N. E. 479, 14 Am. Neg. Rep. 183, the company owned an unfenced common in the city of Toledo. The plaintiff, a boy eleven years of age, was attracted to the common by a game of ball, and while there engaged with some other boys in playing about a bank ten feet in height, he was injured by the falling of the bank, and it was held that the railroad company was not liable. In *Lake Shore & M. S. Ry. Co. v. Liidtke*, 69 Ohio St. 384, 15 Am. Neg. Rep. 652, 69 N. E. 653, liability was denied where a boy, six years of age, strayed onto the right of way of the railroad company in the city of Sandusky, and was injured by a passing train, by which he was attracted, and when trying to touch a passing car. It was held that the company was not liable. In *C. H. & D. Ry. Co. v. Aller*, 64 Ohio St. 183, 60 N. E. 205, footmen with the knowledge of the company, used its station platform and tracks as a route to the village, and the plaintiff intending so to use the platform and tracks set out for the village about a half mile distant, but he did not, as was the custom, leave the platform before reaching the end of it and walk along the track, but continued along the platform, and in the dark stepped off the end of it and was injured. It was held that he was not invited by the company to use its premises, but that its use was merely permissive and that he assumed the risk. In *Pittsburg, Ft. W. & C. Ry. Co. v. Bingham, Adm'x*, 29 Ohio St. 364, it is held: "A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station house, where, at the time of receiving the injury, such person was at such station house by mere permission and sufferance, and not for the purpose of transacting any business connected with the operation of the road."

We may very appropriately conclude in the words of *Allen, J.*, in *Clark, Adm'x, v. Manchester*, 62 N. H. 577: "The excavation for a reservoir was not made and filled with water for a trap, but for a lawful use by the defendants on their own land. The averment of license and invitation of the child to go there is one argument by inference from the facts stated, and the facts positively averred do not warrant and support the inference. The fact that children went to the reservoir pit from curiosity or for pleasure, without objection of the defendant, was not an invitation or license to go there. The child was not upon the land by invitation, nor

under circumstances which made it the duty of the defendants to protect him. He was there to gratify his curiosity, or for mere pleasure, and the defendant owed him no special duty. It was not a case of setting a trap for the children, nor one of wantonly and knowingly leading them into danger and this one into destruction. It was the ordinary case of a landowner managing, within the bounds of his own land, his own property, in his own way, for his own use and benefit; and though in doing this, he might find occasion to construct reservoirs, provide fish ponds, plants and cultivate fruit trees, erect and maintain useful structures, instruments, and machinery, all of which are alluring, attractive, and dangerous to children, yet it could not be claimed that he must constantly guard these things against the approach of persons coming without license or invitation, or suffer in damages for any injury they might receive. The rule that the owner of land may manage it in his own way for his own benefit, and owes no duty to those who come upon it for no business purpose, but without license express or implied, is too well established to need further comment, or to warrant a departure from it." In the case of *Wheeling & Lake Erie Railroad Co. v. Harvey*, the judgments of the Circuit Court and of the Court of Common Pleas are reversed, and the petition is dismissed; and in the case of *Swarts v. Akron Water Works Company*, the judgment of the Circuit Court is affirmed.

Judgment in No. 9,830 reversed.

Judgment in No. 10,114 affirmed.

SHAUCK, CH. J., and CREW and DAVIS, JJ., concur in No. 9,830.

SHAUCK, CH. J., and PRICE, CREW, SPEAR, and DAVIS, JJ., concur in No. 10,114.

LIABILITY FOR INJURIES CAUSED BY TURNTABLES AND DANGEROUS ATTRACTIONS TO CHILDREN.

In connection with the case of *Wheeling & Lake Erie R. R. Co. v. Harvey* and *Swarts v. Akron Water Works Co.*, 77 Ohio St. 235, 83 N. E. 66, 21 Am. Neg. Rep. 272 (preceding cases reported herein), and also with the case of *Snare & Triest Co. v. Friedman*, 169 Fed. 1, 21 Am. Rep. 311 (case following this note), and the discussion of the "attraction to children" and "turntable cases" doctrines in these cases, the following cases may be of interest:

Child drowned in reservoir — Playing in open field — Notice of custom — Question for jury.

In *FRANKS v. SOUTHERN COTTON OIL CO. ET AL.*, (*South Carolina*, August, 1909) 65 S. E. 339, an action for death of a child under ten years of age

who while playing around an unprotected reservoir filled with water maintained by defendant in an open field near a highway was drowned, judgment of nonsuit was reversed, it being held that there was sufficient evidence to go to the jury on the question of knowledge or notice of defendant of the facts alleged in the complaint that children were accustomed to play at the place of accident. Opinion by GARY, A. J. See former appeal, 78 S. C. 10, 58 S. E. 960, from an order overruling demurrer to complaint.

Child falling into river — Absence of fence — Owner of premises not liable.

In *PRYOR v. MURNANE ET AL.*, (*Connecticut*, April, 1909) 72 Atl. 571, appeal from judgment for defendants in the Superior Court, New Haven county, the opinion by RORABACK, J., states the case as follows:

"The plaintiff claims to recover damages because of the negligence of the defendants in not erecting a fence in the rear of their lot so as to guard against those thereon from falling into the river, whereby his child was drowned. The defendants in their answer admitted that they owned and controlled the lot in question, which was bounded on one end by the Naugatuck river, and that the second floor of the dwelling house on this lot was occupied by the plaintiff and his family under a lease, when a little boy, one of the plaintiff's children, was drowned. The defendants denied all the remaining allegations of the complaint and went to trial to the jury. At the conclusion of the plaintiff's testimony, the defendants moved for a nonsuit under the provisions of section 761 of the General Statutes, which motion was granted. Subsequently the plaintiff filed a written motion to open the nonsuit, which the court denied. This action of the court presents the only question raised by the plaintiff's appeal.

"An examination of the record discloses that the following material facts were established by the evidence or conceded by the defendants: The plaintiff's intestate, his boy nearly two years of age, was living with his father, mother, and other children, on the second floor of a dwelling house owned by the defendants. The lot on which the house stood and another adjoining lot owned by other parties were bounded by the Naugatuck river on the rear. A stone wall about ten feet high extended from the bank of the river to the level of both lots. There was no fence or barrier of any kind between either of these lots or between the lots and the river. The plaintiff and his family occupied the tenement under an oral monthly lease, and the premises were in substantially the same condition on the date of the accident as when they first took possession of them several years before. The plaintiff and the members of his family used the yard between the rear of the house and the river as a playground for the children, for drying clothes, and for other purposes, during the time they occupied these premises. Upon the day of the accident, the little boy was last seen alive by his mother about 11:25 A. M. in the rear yard engaged in play with other children. Nearly an hour later, his dead body was found in the river about six feet south of the defendants' lot, opposite the land of the adjoining proprietor. The plaintiff alleged in his complaint that his child fell into the water and

was drowned owing to the negligence of the defendants in not erecting a fence along the river.

"The burden of proof was upon the plaintiff, and he was bound to prove not only the defendants' negligence, but that such negligence caused his intestate's injury. It is unnecessary to inquire whether there could have been a recovery, had there been evidence that the boy fell into the river from the premises owned by the defendant, and on account of the lack of a fence thereon. The testimony failed to show whether the boy fell into the water from the wall of the defendants, or that of the adjoining proprietor opposite the point where his body was found. The cause of the accident is left wholly to conjecture. While it is not necessary for the plaintiff to exclude every possibility that the accident may have happened through some cause other than the negligence of the defendants, he is bound to introduce evidence enough to remove the cause from the realm of speculation, and give it a solid foundation upon facts, for the harmful effect of which the defendants are responsible. *Morse v. Consol. Ry. Co.*, 81 Conn. 395, 399, 71 Atl. 553. There is no error." *Judgment affirmed.*

**Child playing on gas wagon left standing in street injured in explosion —
Attractive nuisance — Trespasser — Gas company liable.**

In *IAMURRI v. SAGINAW CITY GAS CO.*, (*Michigan*, April, 1907) 111 N. W. 884, appeal from a judgment for plaintiff in the Circuit Court, Saginaw county, in an action for injuries to a child about six years old, caused by an explosion of a gas wagon belonging to defendant which had been left standing in the street and on which children were playing at time of accident, judgment was *affirmed* by a divided court. The case is stated in the opinion by MCALVAY, CH. J., as follows:

"Defendant is a Michigan corporation, located at Saginaw, engaged in the manufacture and sale of illuminating and fuel gas. Plaintiff, by his next friend, recovered a judgment for injuries received by the explosion of a drip wagon used by defendant in and about its business, which had been left upon a street of the city of Saginaw. This drip wagon consisted of a platform wagon, upon which was a boiler, iron or steel tank, seven feet long and two and a quarter feet in diameter, extending lengthwise and firmly fastened. On the front end of the wagon, and above the end of the tank, was a seat for the driver. On the top of the tank, one and a half feet back of the seat, was a venthole, one and a quarter inches in diameter, closed by means of a metal plug which screwed into place. At the rear end of the tank was a pump, by means of which the drip or refuse from the sink pots along the gas mains was pumped into the tank. This drip wagon was used by defendant for this purpose. A rubber hose attached to the pump being fastened to the pipe from the drip pot, the drips were pumped into the tank, which when filled was driven to the Saginaw river and emptied. When the tank was being filled the vent was unstopped to allow the air to escape; and when full, it was closed to prevent the drips from splashing out and running down the outside of the tank. This wagon was drawn by one horse. It was the proper and usual appliance for the purpose for which it was used.

This work is necessary to keep the gas pipes free from water which may leak into, or become condensed in, the pipes, and also from an oily substance, known as 'hydrocarbons,' which accumulates in them. In removing the drips a greater or less amount of illuminating gas would necessarily be taken into the tank. Vapors arising from the substances pumped out also are generated in the tank. Neither the gas nor the vapors are explosive in themselves, but when mixed with a proper proportion of air an explosive mixture is formed, and when this mixture is brought in contact with fire in any way an explosion will follow. On July 7, 1904, an employee of defendant was engaged with this appliance in collecting these drips. When he quit work at night the tank was about one-third filled with drips. As was his custom he drove to the barn, near which the wagon was kept when not in use, intending to continue work the next day. The wagon was left standing in the street near the curb, and the horse put in the barn of Blank & Baker, who cared for defendant's horses and washed and oiled the wagons. The vent in the top of the tank was left open. Plaintiff, a boy five and a half years old, and a boy companion between six and seven years old, were playing in this street, and after the drip wagon had been left there climbed upon it, plaintiff climbing upon the seat in front, and the other boy upon one of the hind wheels. An employee of Blank & Baker saw them there, and went out, telling them to get off the wagon. Plaintiff was too small to get down without assistance, and the man lifted him down and told both of them to keep off from the wagon. Within a few minutes after this man went back into the barn the two boys climbed back on the wagon, plaintiff getting up into the seat in front, and the other boy up the hind wheel and on to the tank, sitting astride of it near the venthole. While they were in this position the tank exploded, the front end being blown out, and the plaintiff was thrown twenty to twenty-five feet into the air, and fell upon the pavement near the curb about twenty feet south of the wagon. The only evidence in the case as to the cause of the explosion was given by two women, witnesses for defendant, who were sitting in the doorway of a house a short distance south of the wagon, and another witness for defendant, a man on the sidewalk across the street. One of the women testified that she saw the larger boy when he was sitting on top of the tank light a match and drop it into the venthole. The man testified that he saw this boy lean over and look into the venthole; that he raised his hand up to the venthole, and as he did so the explosion occurred. The other woman testified substantially the same as the man. Both women testified that he was using matches on the street shortly before this occurrence. This boy denied that he had matches, or that he put any match in the venthole. Plaintiff was seriously injured. Besides severe bruises, his arm was broken, and it is claimed that a hernia resulted from the injuries." * * *

The learned judge discussed the question of liability for injuries caused by failure to properly guard "attractive nuisances" to prevent injuries to children [citing several cases]. He said:

"It is an undisputed fact in the case that defendant is chargeable with knowledge of the contents of the tank and the conditions necessary to render them actively dangerous. It cannot be seriously claimed that

this wagon was rightfully in the highway, nor that the facts show that it was unguarded or protected while standing upon the highway. It is true one of the firm which owned the barn had warned these children to go away and not to play around there, and on this occasion one of the barnmen a few minutes before the injury had lifted the plaintiff down from the seat of the drip wagon and told the boys to go away and keep off from it. The children had a right to play on the highway, and this wagon was easily accessible and attractive to them as they were lawfully playing upon the highway. We cannot hold that putting these children off from the wagon and warning them away and paying no further attention to them amounted to properly guarding and protecting this property. It was negligence on the part of the defendant to leave this wagon in this manner in the public highway."

The judgment of *affirmance* was concurred in by CARPENTER, MONTGOMERY and MOORE, JJ.

In a concurring opinion MONTGOMERY, J., reviewed numerous authorities on the question decided. MCALVAY, CH. J., and CARPENTER and MOORE, JJ., concurred with MONTGOMERY, J.

Dissenting opinions were rendered by OSTRANDER, J., (who cited several authorities as to liability towards trespassing children), and by HOOKER, J., who treated exhaustively the questions in issue, citing and quoting numerous authorities on the liability for injuries to children by attractive nuisances, turntables, etc., and cases bearing on the maxim, "*sic utere tuo ut alienum non laedas*." GRANT, J., concurred with HOOKER, J. In *concurring* with HOOKER, J., in his dissenting opinion, BLAIR, J., said: "I concur. for the reason that in my opinion this case is ruled by *Kaumeier v. City Electric Ry. Co.*, 116 Mich. 306, 74 N. W. 481."

In the concurring opinion of MONTGOMERY, J., for *affirmance* of judgment, the learned judge, referring to the *Kaumeier* case, said:

"The case of *Kaumeier v. City Elect. Ry Co.*, 116 Mich. 306, 74 N. W. 481, is cited as authority for the proposition that a child who interferes with property in the street is a trespasser and cannot recover. That case was a case of interference with a car standing upon the track of a street railway company, and the concluding statement of the opinion was: 'The defendant had just as much right to leave this car where it did as a farmer would have to leave his wagon or carriage upon his own side of the highway, and no one would have the right to move it, except upon the claim that it impeded public travel. The car being rightfully left where it was upon the track, and not being a thing dangerous in itself, the court should have directed the verdict in favor of the defendant' But the court in that case distinctly declined to consider and pass upon the doctrine of the turntable cases, as it was not deemed necessary." * * *

Fire kindled on vacant lot - Child playing nearby burned - Negligence - Proximate Cause - Defendant liable.

In *ROSS ET UX. v. CHESTER TRACTION Co.*, (*Pennsylvania*, March, 1909) 73 Atl. 188, appeal by defendant from judgment for plaintiffs in the Court of Common Pleas, Delaware county, in action for fatal injuries to plaintiff's

child, seven years old, caused by her clothing catching fire while she was playing with a companion in the neighborhood of a fire kindled by defendant's employee on a vacant lot near defendant's car barn, judgment for plaintiffs was *affirmed*. Opinion by MESTREZAT, J., who reviewed the evidence and *held* that there was sufficient to warrant the jury in finding that defendant was negligent in burning the rubbish and leaving the fire in the condition it did when its employee left it, and also that its negligence in not properly guarding the fire was the direct and proximate cause of the child's clothing catching fire, resulting in her death. ELKIN, J., *dissented*.

Child injured by machinery on vacant lot — Negligence for jury.

In *HENDERSON ET UX. v. CONTINENTAL REFINING CO., LIMITED*, (*Pennsylvania*, January, 1908) 68 Atl. 968, appeal from nonsuit in the Court of Common Pleas, Venango county, judgment was *reversed*. The opinion by POTTER, J., states the case as follows:

"The only question presented for review by the appeal is whether the learned trial judge erred in refusing to take off the judgment of compulsory nonsuit entered by him at the close of the plaintiffs' evidence, upon the trial of this case. The injury for which damages are claimed was the death of a boy seven years of age, caused, as is alleged, by the negligence of the defendant company in failing to cover or guard a piece of pumping machinery, located upon a vacant lot adjacent to the highway. It is apparent from the description of the pumping machinery, with its revolving cogwheels and attachments, that it would be dangerous for any one to come in contact with it while in motion, and there is testimony in the case that it is customary to guard or cover similar machines. The defendant company owns and operates an oil refinery near Oil City, on the westerly side of a public road. It also owns land on the easterly side of the same road, upon which are located two houses belonging to the company and occupied by its tenants. These houses front upon the road, and are separated by vacant ground some forty or fifty feet in width, also belonging to the defendant. The side door and porch of the southerly house opens directly upon the vacant lot, and opposite to it is a gate entering the yard of the northerly house. Between this door and gate there was formerly a path, which was used to pass from one house to the other. The vacant lot extended westward to the road, and easterly to Oil Creek. It was level with the road and was not fenced in. It appears from the testimony that the lot was used for a common, and the children of the neighborhood had used it as a playground. Plaintiffs, who are the parents of the boy who was killed, at one time lived in the southerly house, but moved elsewhere some time before the accident. About July 1, 1903, the defendant company placed upon this vacant lot the pumping machinery in question, and located it at a point midway between the two houses, and on the path connecting them, or very close to it. Between the road and the pump, about twenty or twenty-five feet from the latter, was a gas engine used to operate it, and connected with it by a belt. On July 29, 1903, about four o'clock in the afternoon, the seven-year-old son of plaintiffs went to the house north of the lot where the pumping machinery, generally called the 'power,' was located, as

described seeking a playmate who lived there. He went in the front way from the road, saw his friend's father, who told him his son was not at home, and then passed out by the side gate into the lot. He was seen a few minutes later standing a few feet from the power, looking at it. In some way which is unexplained, as no one saw him at the moment of the accident, he was caught in the machinery, carried around, and thrown down upon the ground. One of his legs was so badly injured as to make amputation necessary, and he died the same night from the shock and loss of blood.

"The trial judge seems to have been impressed with the idea that the boy climbed upon the machinery, for the sake of having a ride upon the revolving power; but we do not find anything in the evidence to indicate that such was the fact. At most it was but an inference, and as such it was for the jury to draw. No one saw the boy climb upon the machine. Just before the accident he was seen standing near the power. When next seen, he was falling to the ground. How he became involved in the machinery, whether by climbing upon it or by standing too near, is only a matter of inference. The age of the boy precluded his being held guilty of contributory negligence as matter of law by the court. Whether or not he exercised, under the circumstances, the degree of care commensurate with his age, was for the jury.

"We do not think the facts in this case bring it within the line of the decisions in which it is held that the landowner owes no duty of protection to those who may be upon the premises. Under the circumstances it can hardly be said that the child was where he had no right to be. The entire tract of land, including the two houses, and the ground between them, belonged to the defendant company. As has already been noted, one of the houses was built with a side door and porch opening directly upon the vacant lot, and from the other house a gate placed in the fence opened from that side directly into the lot. The door provided upon one side and the gate upon the other certainly was sufficient to indicate to tenants in the houses, to their families and guests, an implied permission, or invitation, to enter upon and cross the vacant lot. As a matter of fact, under this permission it was used for years to such an extent that a path was worn across the lot between the two houses. The lot was also permitted to be used as a playground for the children of the tenants in the houses, and by other children. After permitting this use of the property for several years, the defendant company, according to the testimony, erected this dangerous piece of machinery right upon, or close to, the pathway between the two houses. It did not inclose or guard the machinery, nor did it shut up the door or the gate leading from the houses to the lot. It seems to have done nothing to give notice that the permissive use of its land as a passageway and playground was to be discontinued. Upon the day of the accident plaintiff's son went to the home of the tenant living in the northern house, upon a lawful errand, to see a member of the family. On leaving he passed through the side gate onto the lot; the existence of the gate being apparently an invitation to him to go out in that way. His attention would be naturally attracted to the curious machinery located on or near the path and but a few feet away. A fair inference is that heedlessly, or without appreciat-

ing the danger, the child ventured too near, and was injured. Under these circumstances he cannot fairly be regarded as a mere trespasser. The lot was really an appurtenance to the two houses, and was a part of the curtilage. It was not only so used by the occupants of the houses and their visitors, but it was expected that it should be so used, because of the arrangements made to enter upon it from the sides of the houses. The language which counsel for defendant company cite as defining the term 'invitation' seems to fit very closely the facts of this case, so that the inference may well be drawn that the child 'entered the premises because he was led to believe that they were intended to be used by visitors, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the place was adapted and prepared or allowed to be used.' In *Kay v. Penna. R. R. Co.*, 65 Pa. St. 269, Judge Agnew said: 'Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights, may, by a change of circumstances, become negligence, and a want of due care. * * * If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances, so as not to mislead others to their injury, without a proper warning of his intention to recall his permission.'

"As to the suggestion that the parents were guilty of contributory negligence, they could not be so held as matter of law, merely because they allowed a seven-year-old boy to go around by himself upon the streets in the vicinity of his home, or to visit a neighbor's house. At most the question would be for the jury. *Enright v. Pittsburg Junction R. R. Co.*, 204 Pa. St. 543, 54 Atl. 317, 15 Am. Neg. Rep. 445, 9 Am. Neg. Rep. 364. The same may be said as to the contention that the parents were negligent in not warning the boy to keep away from the machinery. It was not so clear a duty that the court could declare it as a matter of law. *Herron v. Pittsburg*, 204 Pa. St. 509, 54 Atl. 311.

"We are of the opinion that, under every aspect of this case, it should have been, under proper instructions, submitted to the jury.

"The judgment is reversed, with a *procedendo*."

Child playing on unguarded lot injured by machinery — Negligence for jury.

IN *MILLUM ET AL. v. LEHIGH & WILKES-BARRE COAL CO.*, (*Pennsylvania*, June, 1909) 73 Atl. 1106, judgment of nonsuit was reversed, the opinion by POTTER, J., stating the case as follows:

"The dividing line between the principle upon which *Thompson v. B. & O. R. R. Co.*, 218 Pa. St. 444, 67 Atl. 768, was based, [see the report of this case among the cases in this note, *post*] and that upon which *Henderson v. Continental Refining Co.*, 219 Pa. St. 384, 68 Atl. 968 stands, may be a narrow one, but the distinction in principle between them may be readily traced. In the former case the child who was in-

jured was considered as an intruder and a trespasser upon the property of the defendant company. In addition to this he was injured through the action of his playmates, rather than by reason of any machinery which the defendant company set in motion. Under the circumstances of that case it was held that the property owner was not liable for the injury to an intruder, caused not merely by the condition of the premises as they were, but chiefly by the carelessness of other children, who were also intruders and intermeddlers. Upon the other hand, in *Henderson v. Continental Refining Co.*, 219 Pa. St. 384, 68 Atl. 968, it was considered that the child who was hurt by coming in contact with dangerous machinery, left unguarded, was lawfully upon the premises; that the defendant company in that case, which owned both the lot where the dangerous machine was erected and the dwelling houses on each side of it, had, by placing a gate in the fence upon one side, and a door in the house upon the other, each opening upon the lot in question, and in addition by permitting the lot to be used for passage between the two houses, and as a playground for the children living in them, thereby extended to tenants in the houses, to their families and guests, an implied permission to enter upon or cross the vacant lot.

"At the time of the trial of the present case the decision in *Henderson v. Continental Refining Co.*, 219 Pa. St. 384, 68 Atl. 968, had not been handed down, and therefore it could not have been brought to the attention of the court below. We consider that it is controlling as applied to the facts of the case at bar. Here the facts, as stated by counsel, are substantially as follows: The accident, by which a little boy only four and a half years old was most severely injured, occurred in a field, some fifty or sixty acres in extent, owned by the defendant company, and lying on the outskirts of the city of Wilkes-Barre. The field was for the most part open and unfenced, and was used apparently as a common, and at times as a picnic ground, and for the purposes of a playground. At a certain point in the field was a bore hole, and to the west, about a quarter of a mile away, was an engine house of the defendant company. Between the engine house and the bore hole were a number of shieve wheels, placed on frames, about fifty feet apart, and varying in height. These wheels are of iron, about two feet in diameter, and with a flange to guide a wire rope, which passes over them from the engine house to the bore hole. The rope is used for raising and lowering coal, in the mining operations of the defendant. The accident occurred at the sixth pulley, or shieve wheel, from the bore hole, or about 300 feet from it. It appeared that this wheel was situated about fifty feet from the roadway, and the wire rope ran parallel with the roadway for a considerable distance. The moving wheels and the moving rope were uncovered, and were naturally dangerous to any one who might come in contact with them. The little boy who was injured lived with his parents, in a house some 500 feet away from the place of injury. No one saw the accident, but the child was found by two women fast in the wheel. One witness testified that many children played on the premises, and held picnics there. He said children had been playing there for years; that the place was a regular common.

"Where the owner of property invites or permits its use by the public

as a common, or for a playground, or a picnic ground, it is certainly the duty of the owner to use reasonable precautions to protect the public from the operation of dangerous machinery located thereon. Under such circumstances a different duty is imposed upon the owner from that required of him towards those who are merely trespassers upon his property. The principle here involved was clearly set forth in *Kay v. Penna. R. R. Co.*, 65 Pa. St. 269, 273, where Justice Agnew pointed out that, while ownership of ground carried with it the right to use it in the way most convenient and beneficial to the owners, yet, as he said, 'the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and by sufferance permitted the public to enjoy a privilege of passage which might bring their persons into danger. Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care.'

"In the case at bar the question to be determined is, Would an individual of common sense and ordinary intelligence, placed in the position of the defendant company, and possessing the knowledge, which it must be assumed to have had, of the public use made of the premises, have seen that there was a likelihood of the uncovered machinery causing some injury to children resorting to the place and using it as a playground, and would he then under the circumstances have considered it a duty to put a stop to the public use of the ground, or to take ordinary precautions to prevent such an accident as that which occurred? We are of opinion that this case should have been submitted to the jury, under proper instructions from the court, for them to determine whether under all the circumstances the defendant company was negligent.

"The judgment is reversed, with a *procedendo*."

Child trespassing on track injured by third rail — Railroad company not liable.

In *RIEDEL v. WEST JERSEY & S. R. Co.*, (U. S. C. C., E. D., Pennsylvania, June, 1909) 170 Fed. 816, motion for new trial by plaintiff was *overruled*, the opinion being rendered by J. M. McPHERSON, District Judge, the facts being stated as follows:

"The defendant operates a line of electric railway eastward from Camden to Atlantic City in the State of New Jersey, using the third-rail system. Except at stations and crossings the rail is unprotected, but, so far as appears, the right of way is fenced in accordance with the requirements of the New Jersey statutes. At all events, it was so fenced at the point where the injury happened for which this suit is brought. The other facts relating to the accident are few and undisputed: On July 4, 1908, the plaintiff, who was then a lad nearly eight years old, went with his parents to visit friends of the family residing in the village of Westville. The house, which was about two blocks east of the station, fronted on the street, and the lot extended back to the defendant's right of way. Between the lot and the tracks was a pointed picket fence five

feet high in which there was a gate. The fence and the gate had been in place nearly six years at least, and during that time, so far as the testimony discloses, no one had used the gate. It was fastened with a slip bolt, and was further secured with 'a piece of wood, sometimes a nail, whatever I found handy'—to use the language of the owner of the property. During the morning the plaintiff was engaged in play with another boy nearly nine years old, and after various excursions they found themselves in the back part of the lot. Looking through the fence, they saw and were attracted by some flowers growing on the other side of the rails, and went to the gate to open it. Finding it fastened, the plaintiff's companion, as he testified, 'put a nail or a piece of wood, then pulled it out again, and it came open.' Having thus unbolted the gate, the two started to pluck the flowers. The first boy crossed the tracks in safety, but the plaintiff fell, apparently having tripped over something, and came in contact with the third rail, sustaining severe and permanent injuries. Upon these facts the court directed a verdict for the defendant, and the question now is whether this instruction was correct.

"I have had the advantage of an elaborate and very capable argument in support of the plaintiff's contention that the case should have been submitted to the jury, but I have not been convinced that the action of the court was wrong. It would extend this opinion unduly to follow the argument in detail, but I may indicate briefly the reasons that have controlled my judgment. In the first place, the class of decisions to which the 'spring-gun' cases belong may, I think, be laid aside as inapplicable. The plaintiff was making a lawful use of its right of way. It was employing an instrumentality which it was permitted to use, in a manner which it was at liberty to adopt, and upon a roadbed which was fenced and set apart as required by law. No statute compelled it to cover the third rail, although such protection was properly—and, it is not too much to say, was necessarily—given to the public at crossings and stations, where passengers and other persons had a concurrent right. It is so clear, however, that the 'spring-gun' cases are not in point, that I content myself with referring to a note appended to *State v. Barr*, 29 L. R. A. 154, in which the whole subject was discussed a few years ago. Neither, as it seems to me, are the so-called 'turntable' cases applicable. The essential feature of this class is the attractiveness of the turntable, or other device, whatever it may be, especially its attractiveness to children; and, where these decisions are accepted as authoritative—they are denied in a good many jurisdictions—it has been held that the owner of the device must recognize such attractiveness and take reasonable precautions accordingly. As is said in 29 Amer. & Eng. Ency. of Law (2d. ed.) 33: 'This liability is based on the theory that there is an implied invitation to such children to visit the turntable, it being a dangerous place, which the railroad knows or reasonably ought to know is attractive as a plaything to children, whose judgment is too immature to enable them to realize its dangerous character, and that therefore it is the duty of the railroad so to safeguard it that such children cannot be injured thereby.'

"See, also, two recent cases, *Conrad v. Balt. & O. R. Co.*, (W. Va.) reported in 61 S. E. 44, 16 L. R. A. (N. S.) 1129, [see the report of this case among the cases in this note, *post*] and *Wheeling & L. E.*

R. Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66, 21 Am. Neg. Rep 272, especially the case of Wheeling & Lake Erie Railroad Co. v. Harvey, a decision by the Supreme Court of Ohio, in which the whole subject of a property owner's liability to a trespasser, whether he be an adult or a minor, is learnedly and satisfactorily treated. Reference may also be made to the note to Ft. Worth Railroad Co. v. Robertson, 14 L. R. A. 781." * * *

The court held that defendant was not liable, there being nothing about its track which it could reasonably anticipate would attract children. EVANS & FORSTER, appeared for plaintiff; JOHN HAMPTON BARNES, for defendant.

Child injured while playing on turntable — Attractive nuisance — Railroad liable.

In LEWIS v. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO., (*Indiana App., Division 2*, March, 1908) 84 N. E. 23, appeal from judgment of Circuit Court, Dearborn county, sustaining demurrer to the complaint in action for damages for injuries sustained by plaintiff, a boy less than six years of age, while playing with other children on defendant's unguarded turntable, judgment was *reversed*. The opinion was rendered by COMSTOCK, J., who, after stating the case, said:

"The courts are not in harmony in their views of turntable cases. There are decisions holding that a child who was injured while trespassing on unsafe premises cannot recover damages of the owner of the premises by reason of their unsafe condition, unless the landowner is guilty of such negligence as amounts to wanton injury. 1 Thompson's Neg. Supp. § 1026. Under this rule the appellee would not be liable, though it induced the child to enter the premises and encounter the danger by reason of its attractiveness to his immature mind. 1 Thompson's Neg. Supp. *supra*, and cases cited. The foregoing rule has not been followed in this State. The courts of Indiana do not regard a child of tender years, attracted by something on the premises which appeals to his curiosity, as a trespasser. 'What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years.' *Northwestern E. L. R. Co. v. O'Malley*, 107 Ill. App. 599; *Chicago, etc., R. Co. v. Fox*, 38 Ind. App. 268, 15 Am. Neg. Rep. 702, 70 N. E. 81, and cases cited." * * *

"The demurrer admits that appellee knew, as charged, the probable consequence of maintaining an unguarded and unfastened turntable at the place named and in the manner alleged to the peril of the lives of children; that it knew that children frequently played upon the table, turned it round, and rode upon it; that they were thus impliedly invited and induced to use it in ignorance of their danger; and that, under these circumstances, the minor son of the appellant, by reason of his immature judgment, who was unable to comprehend his peril, went upon the premises and was injured, as alleged. The demurrer should have been overruled. *Young v. Harvey*, 16 Ind. 314; *City of Indianapolis v. Emmelman* 108 Ind. 530, 9 N. E. 155; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156; *City of Pekin v. McMahon*, 39 N. E. 484; *Brinkley Car Works & M. Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154 (subsequent

decision, 70 Ark. 331, 12 Am. Neg. Rep. 508, 67 S. W. 752); *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac. 450, 3 Am. Neg. Rep. 392; *Schmidt v. Kansas, etc., Co.*, 90 Mo. 284, 1 S. W. 865, 2 S. W. 417; *Great Southern R. Co. v. Crocker*, 131 Ala. 584, 31 South. 561; *Thomason v. Southern R. Co.*, 113 Fed. 80, 15 Am. Neg. Rep. 703, 51 C. C. A. 67; *East. Tenn., etc., R. Co. v. Cargille*, 105 Tenn. 628, 9 Am. Neg. Rep. 200, 59 S. W. 141; *San Antonio, etc., R. Co. v. Skidmore*, 27 Tex. Civ. App. 329, 11 Am. Neg. Rep. 163, 65 S. W. 215; *Edgington v. Burlington, etc., R. Co.*, 116 Iowa, 410, 12 Am. Neg. Rep. 27, 90 N. W. 95; *Chicago, etc., R. Co. v. Krayenbuhl*, 65 Neb. 889, 12 Am. Neg. Rep. 300, 91 N. W. 880; *San Antonio, etc., R. Co. v. Morgan*, 24 Tex. Civ. App. 58, 11 Am. Neg. Rep. 498, 58 S. W. 544; *Indianapolis Water Co. v. Harold*, (No. 5,707 Ind. Sup.) 83 N. E. 993. While the case last cited is not a turntable case, yet the court, in holding the complaint good, impliedly recognizes the 'attractive nuisance doctrine,' which 'finds its most frequent application in the turntable cases.' Judgment reversed, with instructions to overrule the demurrer to the complaint."

See also the SWANGO case (next paragraph) which was affirmed on the ruling in the LEWIS case (preceding paragraphs).

In CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. *v.* SWANGO, (*Indiana App., Division 2*, January, 1909) 86 N. E. 1000, appeal by defendant from a judgment for plaintiff in the Circuit Court, Dearborn county, judgment for plaintiff, an infant, was *affirmed* on the authority of the LEWIS case, the brief opinion being rendered by COMSTOCK, P. J., as follows: "This is a turntable case. The questions presented by the record were passed upon in LEWIS *v.* CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO., (Ind. App.) 84 N. E. 23, and the facts as shown by the answers to interrogatories are analogous to those alleged in the complaint in the last-named case. A petition to transfer said LEWIS Case to the Supreme Court having been denied, this judgment is, upon the authority of that case, affirmed."

Child injured at turntable—Railroad company liable.

In BROWN *v.* CHESAPEAKE & OHIO RY. CO., (*Kentucky*, December 1909) 123 S. W. 298, appeal from judgment for defendant in the Circuit Court, Pike county, in an action to recover damages for injuries to plaintiff, a boy twelve years of age, whose foot was crushed while playing on a turntable maintained by defendant near a public highway, judgment was *reversed*, the doctrine of the "turntable cases" holding railroad companies for injuries to children playing about turntables left unguarded or not securely fastened being adhered to.

The opinion was rendered by NUNN, CH. J., who discussed the "turntable doctrine," as announced in *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and cited several Kentucky cases in support of that doctrine viz., *Bransom's Adm'r. v. Labrot*, 81 Ky. 638; *Kentucky Central R. Co. v. Gastineau's Adm'r.*, 83 Ky. 119; *Louis. & N. R. Co. v. Popp*, 96 Ky. 99, 16 Ky. Law Rep. 369, 27 S. W. 992; *Swartwood v. L. & N. R. Co.*, 33 Ky. Law Rep. 785, 111 S. W. 305; *City of Owensboro v. York*, 117 Ky. 294, 25 Ky. Law. Rep. 1397, 1439, 77 S. W. 1130; *Board*

of Councilmen *v.* Allen, 26 Ky. Law Rep. 581, 82 S. W. 292; Merschel *v.* L. & N. R. Co., 121 Ky. 620, 27 Ky. Law Rep. 465, 85 S. W. 710; Ill. Cent. R. Co. *v.* Wilson, 23 Ky. Law Rep. 684, 63 S. W. 608; Sydnor *v.* Arnold, 122 Ky. 557, 28 Ky. Law Rep. 1250, 92 S. W. 289; together with cases from other States for and against the doctrine.

Child injured by turntable — Railroad company not liable.

In THOMPSON *v.* BALTIMORE & OHIO R. R. Co., (*Pennsylvania*, June, 1907) 67 Atl. 768, 218 Pa. St. 444, appeal from judgment for plaintiff in the Court of Common Pleas, Philadelphia county, in an action for damages for injuries to an eight-year-old boy while standing near a turntable, judgment was reversed. The opinion was rendered by FELL, J., the facts of the case being stated as follows:

"The defendant maintained a large train yard, used for the shifting and storage of cars and the receipt and delivery of freight, in close proximity to a thickly populated section of the city of Philadelphia. Ten or twelve feet from an entrance to the yard from a public street there was a turntable, which was not kept locked when not in use, but was fastened by a brake that any one could open. A high board fence surrounded the yard, but in places it was broken, and the gates were usually open. Little or no effort appears to have been made to exclude the public from the yard, and at times it was used by persons residing in the vicinity as a playground. One of the plaintiffs, a boy not quite eight years of age, entered the yard at night through an open gateway, and while standing near the turntable, with which some children were at the time playing, was struck by a projecting bar which they used in turning it, and was thrown into the pit and caught between the wall and the turntable." * * *

After reviewing a number of cases bearing upon the liability for injuries to children and others entering upon land without permission, the court said:

"The fact that the person injured was a child makes no difference, unless there was negligence. The plaintiff's youth relieves him of the charge of contributory negligence, but it does not give rise to an imputation of negligence on the part of the defendant. He was where he had no right to be, on the property of the defendant, which it was using in a lawful manner for a lawful purpose in the conduct of its business. It owed him the duty not to injure him intentionally, but it was under no duty actively to take care of him either by keeping him out of the yard or by protecting him after he had entered it from his own acts or the acts of others, who, like him, had entered without permission. There was no negligence unless there was breach of duty. There was no breach of duty owing an adult. An owner of land is not liable for its condition to an adult who enters without permission. Unless a different standard of duty is to be established as to a child, there was no liability in this case.

"Whether an owner of land who makes changes on it in the course of its beneficial use, which tend to attract children and to expose them to danger, is under a duty to take special precautions for their safety, is

a question on which there is a conflict of authority. That such a duty exists has been asserted in some jurisdictions and denied in others. The earlier cases on the subject followed *Sioux City & P. R. Co. v. Stout*, 17 Wall. (84 U. S.) 657, 9 Am. Neg. Rep. 614-616, but the tendency of the later decisions is decidedly against the imposition of such a duty. Some of the courts that adopted the ruling in *Sioux City & Pac. R. Co. v. Stout* (*supra*) have since repudiated it, and others have followed it with hesitation, or have limited its application to a particular class of improvements. The establishment of such a duty would create a restraint, which in some cases would amount to a prohibition, upon a mode of beneficial use of land, for the protection of intruders and intermeddlers. It is difficult to see any ground upon which such a duty can be placed. An owner is not liable for leaving his land in its natural shape. Why should he be held liable for placing structures upon it which are harmless in themselves and are necessary for the lawful use he wishes to make of it? It cannot be said that he invites or allures children because no such intention in fact exists, nor that he sets a trap for the innocent and unwary. The law does not impose a duty upon the landowner to take special precautions for a class of persons, a doctrine which, if carried to its logical conclusion, would, as was said in *Gillespie v. McGown*, 100 Pa. St. 144, 'charge the duty of the protection of children upon every member of the community except their parents.' In *Del. & W. R. Co. v. Reich*, 61 N. J. Law, 635, 4 Am. Neg. Rep. 522, 40 Atl. 682, it was said by Gummere, J.: 'The viciousness of the reasoning which fixes the liability on the landowner because the child is attracted lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted.' If the standard of duty contended for is set up, it will be an exception to the general rule and a wide and dangerous extension of the liability governing the ownership of property. Where it would logically end it is difficult to determine. As was suggested in *Gillespie v. McGown*, 100 Pa. St. 144, it might make it 'the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches.' In the opinion in *Turess v. N. Y. S. & W. R. Co.*, 61 N. J. Law, 314, 4 Am. Neg. Rep. 520, 40 Atl. 614, it was said by Magie, C. J.: 'It is obvious that the principle on which the rule rests, if sound, must be applicable more widely than merely to railroad companies and the turntables maintained by them. It would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them thereon, which possesses a like attractiveness and furnishes a like temptation to young children. He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water to his buildings; he who leaves his mowing machine or dangerous agricultural implements in his field after his day's work; he who maintains a pond in which boys may swim in summer and on which they may skate in winter—would seem to be amenable to this rule of duty.' The doctrine of the so-called turntable cases has been disapproved in *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068; *Walker, Adm'r, v. Potomac, etc., R. Co.*, 105 Va. 226, 20 Am. Neg. Rep. 221, 53 S. E. 113; *Del. & W. R. Co. v. Reich*, 61 N. J. Law, 635,

4 Am. Neg. Rep. 522, 40 Atl. 682; *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, 9 Am. Neg. Rep. 615, 616, 28 N. E. 283; *Frost v. Eastern R. Co.*, 64 N. H. 220, 9 Am. Neg. Rep. 615, 9 Atl. 790; *Paolino v. McKendall*, 24 R. I. 432, 12 Am. Neg. Rep. 550, 53 Atl. 268; *Ryan v. Towar*, 128 Mich. 463, 12 Am. Neg. Rep. 566, 87 N. W. 644; *Dobbins v. M. K. & T. Ry. Co.*, 91 Tex. 60, 41 S. W. 62; *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993, and in many other cases. The doctrine is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle, and that it cannot be sustained.

"The judgment is reversed, and judgment is now entered for the defendant."

In a *dissenting opinion* by MESTREZAT, J., in the THOMPSON case (*supra*) the learned judge thought the doctrine announced far reaching and important to persons living in congested districts, that it took from them a protection heretofore accorded in all jurisdictions where the life of a child is of greater importance than any commercial interest, and that it completely destroyed the maxim "*sic utere tuo ut alienum non ledas*." Citing and reviewing many authorities

The learned judge after reviewing the "turntable cases," said:

"The majority opinion in the present case says that the turntable cases have been disapproved in New York and in a few of the other States. This is true, but this court, on the other hand, affirms *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. (84 U. S.) 657 (9 Am. Neg. R. p. 614), the original turntable case, by a unanimous judgment in *Arnold v. Penn. R. Co.*, 115 Pa. St. 135, 8 Atl. 213, and in that case it is said that the doctrine of the turntable cases was approved in *Penn. Co. v. Toomey*, 91 Pa. St. 256; *Penn. R. Co. v. Lewis*, 79 Pa. St. 33; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 232; *Phila. & Reading R. Co. v. Hummell*, 44 Pa. St. 375 (12 Am. Neg. Cas. 545*n*), and *Biddle v. Hestonville, etc., Ry. Co.*, 112 Pa. St. 551, 4 Atl. 485 (10 Am. Neg. Cas. 133*n*)."

In concluding the learned judge said:

"The doctrine announced in the majority opinion is unquestionably a departure from the settled law of this commonwealth. It is substantially the doctrine of the dissenting opinion in *Duffy v. Sable Iron Works*, 210 Pa. St. 326, 17 Am. Neg. Rep. 710, 59 Atl. 1100, filed less than three years ago. It is not in accord with our own cases or with those of the overwhelming majority of the other States. It is in conflict with the decisions of all the Federal courts of this country, and it is condemned by the courts of England."

Child injured at turntable — Railroad company not liable.

In *CONRAD v. BALTIMORE & OHIO R. CO.*, (*West Virginia*, March, 1908) 61 S. E. 44, appeal from judgment for plaintiff in the Circuit Court, Cabell county, for \$500 for injuries sustained by a child in a turntable accident, judgment was *reversed*, the syllabus by the court holding that:

"The law imposes no liability upon a railroad company for maintaining, upon its private property, an unlocked, unfastened, and unguarded turntable,

in favor of children, though located in a thickly settled community, near a public street and on ground on which children are wont to congregate for play."

The opinion was rendered by POFFENBARGER, P., the case being stated as follows:

"The Baltimore & Ohio Railroad Company complains of a judgment for \$500. rendered against it and in favor of Homer Shella Conrad, an infant, on a demurrer to evidence, by the Circuit Court of Cabell county, in an action for injuries sustained by the plaintiff while playing on an unlocked, unfastened, and unguarded turntable, owned or operated by the defendant, and located in a thickly settled portion of Central City, a place of about 3,000 inhabitants, about 150 feet from one of the principal cross-streets, and near grounds on which children were wont to congregate and play. The turntable is on a spur track of the railway built by the Huntington & Big Sandy Railroad Company and afterwards operated by the Ohio River Railroad Company, and now by the Baltimore & Ohio Railroad Company as lessee or owner, but the table had not been in use for some time before the accident happened. Plaintiff and other boys had frequently assisted the railway employees in turning engines on it by invitation. They had also played 'Hide and Seek' and 'Throw the Wicket' around it, and it was not unusual for some of them to start the turntable and ride on it. In this latter form of amusement the plaintiff had not engaged until the day on which he was hurt. Then he was down in the pit pushing the machine around, and, just before one end of it came to the fixed track rails, he jumped up on it, but, failing to get back far enough to avoid injury, his leg was caught and severely hurt both above and below the knee, the flesh being bruised, torn, and lacerated in both places, and a bone broken above the knee. He was a bright, intelligent little fellow about twelve years old, had worked in a glass factory for a considerable period of time before he was hurt, knew the danger incident to the operation of the turntable, and would not have been hurt had not another boy been so near the end of the machine that he could not get back out of danger.

"The doctrine of what are known as the 'Turntable Cases,' first declared in *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and reaffirmed in *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, has not been generally accepted by the State courts, nor is the authority of those cases more than merely persuasive here. On the contrary, it has been most emphatically repudiated in Massachusetts, New York, New Hampshire, New Jersey, Texas, Pennsylvania, Ohio, and Virginia. Moreover, this court has in two cases declared against it unequivocally, though a turntable accident was not involved in either of them. *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Uthermohlen v. Boggs Run Co.*, 50 W. Va. 457, 40 S. E. 410, 12 Am. Neg. Rep. 567. It is true Judge Brannon, in delivering the opinion of the court in the latter case, said: 'A turntable in a town is in a much frequented place, and though private property the place is much used as a highway, and the company may be held to know that children do and will come upon its premises'—and then demonstrated the utter absence of any public character or right in the premises in question; but this affords no ground

for an inference of approval by him or the court of the principle relied upon here. In the preceding paragraphs of the opinion he had vigorously condemned it. In the observation quoted he was simply indicating inapplicability of the principle to the facts, if the court could yield assent to it as a sound principle of law. Though the declarations of this court may be regarded as *dicta*, turntables not having been involved, that is immaterial, since we approve the reasoning upon which the conclusions are based. Like other decisions, not binding as precedents, they are merely persuasive as authority, but we see no ground upon which turntables can be distinguished from other lawful machines, fixtures, or structures on an owner's premises calculated to excite the curiosity, or induce the presence, of children. There is an utter lack of intention to do any person wrong in the construction, maintenance, and operation thereof, and the right to perform these acts is incident to the ownership of the land whereon they are done. They are within the dominion and power the law allows an owner to exercise over his own property. Unfastened and unguarded turntables are sometimes called 'attractive nuisances;' but there is in our opinion no principle of the law of nuisance under which the appellation can be justified. A turntable is a useful and lawful machine, affixed to the owner's real estate, and incapable of doing any manner of harm to any person off of the land. It is immobile, not unsightly, not obstructive, not offensive in any sense. Nobody can be injured by it unless he come upon the land and set the machine in motion himself, to his own injury. How can this be logically within the maxim, '*Sic utere tuo ut alienum non lēdas*,'—so use your own as not to injure another's property? Or the other one, '*Prohibetur quis facia in suo quod nocere possit alieno*'—it is prohibited to do on one's own property that which may injure another's? It is utterly impossible for the structure to injure the adjoining property. Individuals may get hurt by it when on the property on which it is located, but in no other way. Nobody but the owner, his servants, and licensees can ever be rightfully on or about it. As long as all others stay away from it, the working of injury to them or their property by it is an impossibility. Under some circumstances, an owner of property is liable for injury done to trespassers on his property, but in such cases the injury is intentional, wilful, and wanton. There is purpose and design to do injury, as in the setting of spring guns for thieves or robbers, by which a neighbor, having no knowledge of it, is hurt while merely trespassing on the property in pursuing his own fowl, and the baiting of traps with decayed meat with intent to attract a neighbor's dogs to their death in the traps. It seems to us that in these cases the malicious intention constitutes the basis of the liability for damages." * * *

"The high character of the United States Supreme Court in which *Sioux City & Pac. R. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, was decided constrained many of the State courts to accept its decision as being well founded in legal principle, and for some years the doctrine seemed likely to be approved throughout the country; but the tide is setting strongly in the opposite direction. It has been disapproved in the following recent cases: *Wheeling & Lake Erie R. Co. v. Harvey*, 77 Ohio St. 253, 83 N. E. 66, 21 Am. Neg. Rep. 272; *Walker's, Adm'r, v.*

Potomac etc., R. Co., 105 Va. 226, 53 S. E. 113, 20 Am. Neg. Rep. 221; Thompson v. B. & O. R. R. Co., (Pa.) 67 Atl. 768, [reported also in 21 Am. Neg. Rep. 306, 218 Pa. St. 444]; Ryan v. Towar, 128 Mich. 463, 87 N. W. 644, 12 Am. Neg. Rep. 566 (not a turntable, but expressly disapproving the doctrine); Dobbins v. Mo., K. & T. Ry. Co., 91 Tex. 60, 41 S. W. 62; Sav., Fla. & W. R. Co. v. Beavers, 113 Ga. 398, 39 S. E. 82, 10 Am. Neg. Rep. 8. We are not unmindful of the peculiarities and frailties of children, nor insensible of the imperious duty, founded upon considerations of humanity and public policy, to throw around them every just and wholesome safeguard, and it would be highly repugnant to our sympathies and natural impulses to withhold from a crippled child any possible right the law gives him; but it is not the province of courts to make laws, or give rights not conferred by law, and we could not do so in this instance without enunciating a principle which, carried to its logical results, would impose an extensive and burdensome restraint upon the dominion of owners over their own property.

"For the reasons stated, the judgment will be reversed, and judgment rendered for the defendant, with costs in this court and the court below."

SNARE & TRIEST COMPANY v. FRIEDMAN.⁽¹⁾

United States Circuit Court of Appeals, Third Circuit, February, 1909.

CHILDREN PLAYING ON STREET — MATERIAL PILED ON STREET — FALL OF STEEL BEAM — CHILD INJURED — LIABILITY OF CONTRACTOR. — In an action for damages for injuries sustained by plaintiff, a child four and a half years old, caused by the fall of some heavy steel beams or girders which were piled on the sidewalk in front of a lot for use in the construction of a building for which defendant was the contractor, it appeared that children had been in the habit of playing in the street near such steel beams, frequently climbing or sitting upon the same, to the knowledge of defendant; that one of the beams was in an insecure position and had been so for a few days; that while plaintiff was playing with other small children in the street she sat on the lower end of the beam, and that another child jumped across the upper end of the beam onto the plank on which that end was resting, causing the beam to fall over and crush plaintiff's foot. *Held*, that defendant was bound not only to use ordinary care in piling the beams or girders, but in maintaining the same so that they might not endanger the safety of those using the sidewalk, and that having knowledge that children were in the habit of playing in the street and that the pile was calculated to attract children to use them for play or rest, defendant owed a duty to such children to pile such beams in such a manner as

1. Petition for writ of certiorari to the U. S. C. C. A., Third Circuit, was denied May 3, 1909. See SNARE & TRIEST CO. v. FRIEDMAN, 214 U. S. 518, mem.

would prevent them falling and injuring children, and failure to do so was negligence, and for injury resulting therefrom defendant was liable (2).

INFANT — CONTRIBUTORY NEGLIGENCE — TRESPASSER. — A child, four and a half years old, injured by fall of beam while she was playing in street, was legally incapable of contributory negligence or of being a trespasser.

DANGEROUS ARTICLE ON HIGHWAY — DUTY TOWARDS CHILDREN. — One who has a dangerous structure or appliance, whether on his own land, or lawfully on a public highway, must use ordinary care to protect, not only those who are able to protect themselves by the use of their faculties, but also those of such tender years who may, without fault on their part, become exposed to such danger (3).

FORMER JUDGMENT — RIGHT OF ACTION — STATE AND FEDERAL COURTS. — A judgment in an action in a State court for personal injuries granting a new trial on the ground that defendant was not negligent, plaintiff voluntarily discontinuing the action, did not bar right of action in a second suit in a Federal court on the same cause of action.

NEGLIGENCE — COMMON AND STATUTE LAW — STATE DECISIONS NOT BINDING ON FEDERAL COURTS. — The general question of liability for negligence, when not modified or regulated by statute law, is a matter of general law, and Federal courts are not required to follow the decisions of State courts.

IN ERROR to the Circuit Court of the United States for the District of New Jersey. The case is fully stated in the opinion. See also 71 N. J. Law, 605, 61 Atl. 401. *Judgment affirmed.*

Before GRAY and BUFFINGTON, Circuit Judges, and ARCHBALD, District Judge.

H. M. HITCHINGS, for plaintiff in error.

GILBERT COLLINS, for defendant in error.

GRAY, Circuit Judge. — The case brought before us by this writ of error is as follows:

Suit was brought in the court below by the defendant in error (hereinafter called the plaintiff) against the plaintiff in error (hereinafter called the defendant) to recover for personal injuries re-

2. *Attraction to children.* — See *Wheeling & Lake Erie R. Co. v. Harvey and Swarts v. Akron Water Co.*, 77 Ohio St. 235, 21 AM. NEG. REP. 000, 83 N. E. 66, and the notes of cases following the Ohio case and immediately preceding the case at bar.

See the decision in the New Jersey court: *Friedman v. Snare &*

Triest Co., 71 N. J. Law, 605, 61 Atl. 401, which is quoted and discussed in the decision at bar.

3. *Turntable cases* — In addition to the authorities cited, see the Ohio case and the notes of cases immediately preceding the case at bar in this volume of AMERICAN NEGLIGENCE REPORTS.

ceived through the alleged negligence of the said defendant. At the time of the occurrences in question certain persons, trading under the firm name of Colgate & Co., were the owners of lands, and the buildings thereon erected, in the city of Jersey City, in the State of New Jersey, bordering on a public street or highway of said city. The lands and buildings were located on the south side of the street, and were used and occupied by the firm for manufacturing purposes. At the time of the acts complained of the firm was engaged in constructing an addition to its buildings, and for that purpose had contracts with the defendant, by which the defendant, among other things, was to furnish and set in place the iron and steel work for the foundation of certain tanks, including cast-iron columns and girders. The defendant, in the course of its performance of this contract, and in the furnishing, delivery, and setting in place of the cast-iron columns and girders, caused to be piled and placed certain iron girders, or I-beams, upon the sidewalk in front of the premises of the said Colgate & Co., for use, from time to time, in the prosecution of its said work. These beams were thirty-two feet long, fifteen inches high, with flanges four inches wide, and weighed about 1,000 pounds each. They were, before and at the time of the accident, stored in two piles, one next to the building line and the other next to the curb line of the street, and parallel therewith, leaving a passageway on the sidewalk between the two piles. It was shown in the evidence that they could be piled so as to be measurably secure by placing a row of three beams upon their sides, and superimposing two others so as to lock with those under them, with their flanges, and one on top locking with the two underneath; or by placing four or five in the bottom row, and building up in the same manner. The sidewalk in front of these premises was asphalted. There was no curbing, but the asphalt pavement sloped into the street, forming a concave gutter, so that teams could drive from the street across the sidewalk into the premises in question.

There was some testimony in the court below touching an alleged transfer of the original contract by the defendant to another construction company, and some controversy consequent thereupon as to whether this company was responsible for the piling of these beams upon the sidewalk. The court below, however, correctly construed the written agreement in question as not in terms transferring the contract, and properly left to the jury the question whether such other company was in charge of the work, or was merely in what it did the agent of the defendant. As to this, the

jury has found in favor of the plaintiff, and the point may therefore be dismissed from further consideration. For the purposes of the case before us, therefore, the defendant is to be considered as an independent contractor, subject to whatever responsibilities attach to it, as such, in the prosecution of its work.

There was evidence tending to show that, at the time of the accident in question, an I-beam on the pile next to the street had become dislocated from its parallel position with the other beams, and was in a position diagonally along the side of the pile, edgeways or nearly edgeways, instead of flat, with the upper end on a piece of plank or joist, and the lower end near the bottom of the pile. It was, at all events, in a state of unstable equilibrium. Several little girls were playing about the pile, some skating on the asphalt pavement and two or more were on the pile, when the plaintiff, Fannie Friedman, four and one-half years old, ran across the street to where the other girls, including her two older sisters, were playing. The testimony tends to show that she sat down on the lower end of the beam just described, and that another girl just then jumped across the upper end of the beam onto the plank on which that end was resting, causing the beam to fall over, crushing the foot of the plaintiff beneath it.

The testimony was somewhat confusing as to the exact position of the I-beam, and as to just how the accident occurred, but there can be no doubt that the beam was in a position dangerous to all who came near it, and especially to those who came in contact with it. There was evidence tending to show that this beam was in this situation, or something like it, for two or more days prior to the accident; that it was noticed by, or should have been noticed by, defendant's servants, and that it had remained in this dangerous position long enough to affect defendant with notice. There was no testimony that directly accounted for this dislocation of the beam in question. There was testimony tending to show that these piles had been in place for several weeks, and that a short time before the accident the number of beams on the pile was less than formerly. How this particular beam came into its dangerous position was a matter, therefore, of conjecture. Whether it had been dislocated from its original position by taking other beams from the pile, for use in the structure under erection, or had been partly moved for the purpose of such use, and then temporarily abandoned, it is not necessary here to determine, even if it were capable of being determined. The evidence as to its dangerous situation, and its existence in that situation for two or more days before the acci-

dent, was properly submitted to the jury, and there can be no objection to the charge of the court in that regard.

The charge of negligence principally insisted upon at the trial was not for the original careless piling of the beams, as was charged in the declaration, but for the maintaining of the pile in the dangerous condition testified to after notice of such condition, or after a long enough time had elapsed for notice to be presumed. After the conclusion of the evidence, the learned judge of the court below permitted an amendment to the plaintiff's declaration, charging the defendant with negligence in the latter respect. The defendant excepted to this action of the court and assigned the same as error. We may dispose of it in passing, however, by saying that the action of the court appears to us to have been the exercise of a sound discretion, and not to have transcended the liberal rule in regard to amendments to pleadings which obtain in the practical administration of justice. There was also testimony admitted over the objection of the defendant tending to show that the asphalt pavement on the north side of the street, near the Colgate factory and these piles, was much resorted to by children of the neighborhood for roller skating and other plays, and that these piles were attractive to such children, as evidenced by the fact that they constantly played thereon, to the knowledge of the defendant. Under the laws of New York, Colgate & Co. were the owners of the fee of the street to its centre, subject to the public easement for purposes of travel, and it is not disputed that either by State law or municipal ordinance they, or their subcontractor by their permission, had the right to a reasonable use of the sidewalk, temporarily, for the storing of material to be used in building, or repair of buildings, on their adjoining property.

The learned judge of the court below instructed the jury, in effect, that not only was the defendant bound to exercise ordinary care in originally piling these girders upon the street, but also in maintaining the piles so that they might not endanger the safety of those lawfully using the sidewalk, and that, if from the weight of the evidence the jury found that the girders so piled on the sidewalk were, at the time of the accident, calculated to tempt and attract little children accustomed to play on the street, to use them for play or rest, and that this was known to the defendant, then, if one of the beams, though originally secure in the pile, became dislocated and was allowed to remain in the dangerous position described in the testimony, for a time long enough to presume notice to the defendant, it became responsible for the damage caused to

the plaintiff, who was without fault. A verdict was found for the plaintiff, and upon the judgment entered thereon this writ of error was sued out.

The assignments of error are very numerous, but they are for the most part covered by the few principal contentions urged at the bar, upon the determination of which the case must turn. The first contention to be noticed is, that the court erred in striking out before the trial, and against the objection of the defendant, the plea of the statute of limitations, and in holding that it was not available to the plaintiff in error. Brief notice only is required of defendant's point, that it had an absolute right to interpose said plea and have it disposed of when it was sought to be availed of during the trial, and that the action of the court, in striking it out before the trial, was contrary to the rules of practice and procedure in New Jersey. We think, however, that the granting of the motion to strike out was a matter within the discretion of the court below. All the facts bearing upon the availability of the pleading were stated in the plaintiff's declaration. Even if the granting of the motion to strike out was at variance with practice and procedure in such cases, no possible harm could come to the defendant by reason of such premature striking out as by the law of the State the action of the court in the premises was reviewable, at whatever state of the trial it was had.

This brings us to the substantial question raised by this assignment of error, whether the action brought by the plaintiff was, under the facts set forth in the pleadings, barred by the statute of limitations of the State of New Jersey. The relevant portions of that statute are as follows:

"All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any person or persons, firm or firms, individual or individuals, corporation or corporations within this State, shall be commenced and instituted within two years next after the cause of such action shall have accrued, and not after." 2 Gen. St. N. J. 1895, p. 1975, sec. 3, as amended by Laws 1895, p. 119.

Section 4 (same statutes and page) reads:

"That if any person or persons who is, are or shall be entitled to any of the actions specified in the three preceding sections of this Act, is, are or shall be at the time of any such cause of action accruing within the age of twenty-one years, or insane, that then such person or persons shall be at liberty to bring said action so as he, she or they institute or take the same within such time as is before

limited, after his, her or their coming to or being of full age or of sane memory as by other person or persons having no such impediment might be done."

It appears from the pleadings that plaintiff, Fannie Friedman, then being between the ages of four and five years, brought an action in the State court of New Jersey, in 1903, shortly after the accident, which, after a verdict in her favor and pending a motion for a new trial, was, for reasons that will hereafter appear, discontinued, and that the present action was begun in January, 1906, two years and six months after the former action, and when plaintiff was something over six years of age. The contention of defendant's counsel is: "That an infant may remain quiescent after the cause of action accrues until majority, and may then bring and maintain the action within two years thereafter, or he may bring his action as an infant, issue a summons in the infant's name, and apply thereafter for the appointment of a next friend to prosecute the action so brought, but, in this case, immediately upon the commencement of this action, he sets the statute running and assumes the same legal position as one of full age."

We cannot agree with this construction of these sections of the New Jersey statute. The learned judge of the court below was of opinion that: "A proper construction of these sections of the New Jersey statute allows the infant all the time intervening between the accrual of the cause of action and its majority, plus a period thereafter equal to the prescribed limitations of the statute."

In the case of *Smith v. Felter*, 61 N. J. Law, 104, 38 Atl. 746, Mr. Justice GUMMERE, of the Supreme Court of New Jersey, in discussing section 4 of the statute, as above quoted, says: "It seems to me clear that the effect of this provision is to stay the running of the statute while the disabilities mentioned therein continue to exist, and that a party suffering from any of such disabilities may maintain an action at any time during their continuance, or within the six years afterwards."

This is practically the opinion of the learned judge of the court below. There can be no doubt that one who was under no disability could bring such an action as we have here, at any time within the limitation of two years prescribed by the statute, discontinue it, and bring another action, provided it also be within the period of limitation. We can see no reason why an infant under twenty-one years of age, against whom the statute is not running at all, should not be able to do the same thing, that is, bring an action, discontinue the same, and bring another or successive actions

during his minority. We can find nothing in the express words of the statute, or in any reasonable interpretation thereof, that justifies the contention of the defendant, as above stated, and no case in the State of New Jersey or elsewhere has been called to our attention which supports the same.

This brings us to the important question in the case, viz., whether defendant owed any duty to the plaintiff for neglect for which it should be held responsible to her in this action. In its consideration, we assume, 1, that the defendant, as an independent contractor with the owner of the premises, might lawfully use such portions of the sidewalk of the public street as it actually did use, for the temporary storage of the I-beam in question, or other material to be used in the structures it had contracted to erect; 2, that defendant, being responsible for placing the I-beams on the street and maintaining them there, owed a duty to the public, including the defendant, to place and maintain them with reasonable care, so that those lawfully on the street, and without fault on their part, might not be injured thereby.

Conceding all this for the sake of argument, defendant denies liability, by reason of the premises, contending that plaintiff was at fault, 1, in that she was an active trespasser upon the girders at the time she received her injury, the trespass contributing thereto; 2, in that she was playing upon the girders at the time of the injury, and not using the sidewalk for purposes of travel, and that such playing contributed to the injury complained of; 3, in that the use which she was making of the girders at the time the injury occurred was unlawful, and therefore defendant owed no duty to her.

The foregoing, of course, are different forms of the same contention. It may be admitted that if one, *sui juris*, had, in using this sidewalk, without reasonable excuse stepped upon the pile of beams while in this condition, and had been injured by the falling of the displaced beam in the manner described, defendant would not have been liable therefor, on the ground of such person's contributory negligence, or possibly on the ground that defendant owed no duty to one who might be considered a trespasser, to see that the pile of beams was properly constructed. The defendant, however, ignores the distinction which we think is inherent in this case, between those who are and those who are not *sui juris*, or rather between those who have and those who have not arrived at years of discretion. In the case before us it is not necessary to consider at what age an infant may be of such discretion as to be responsible in a case like the present for contributory negligence, or for conduct which, in

case of sufficient discretion, would make him or her a trespasser. Fannie Friedman, the plaintiff, at the time of the accident, was only four and one-half years old, and there can be no question that, in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence, or of being a trespasser. The question then arises whether defendant owed to such a child, under the circumstances disclosed by this record, any duty other than that owed to those who were *sui juris*, or who at least had arrived at years where discretion may be presumed. We think there was a peculiar duty of this kind incumbent upon the defendant, in relation to this plaintiff, under the circumstances of this case. Why should not one who has a dangerous structure or appliance, whether on his own land or lawfully on a public highway, use ordinary care to protect, not only those who are able to protect themselves by the use of their faculties, and who are bound to make such use of them as the ordinary experience of mankind justifies us to expect, but also those of such tender years as may, without fault on their part, come within the danger to which the owner of such appliance or structure had exposed them? We think, in reason and in consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years who, to its knowledge, were accustomed to play on the public street in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause the injury to such of these children as might come in contact therewith. *Peirce v. Lyden*, 157 Fed. 552, 85 C. C. A. 312 (4).

4. In *PEIRCE v. LYDEN*, (two cases) 157 Fed. 552 (*United States Circuit Court of Appeals, Second Circuit*, November 7, 1907), error to U. S. Circuit Court for the Southern District of New York, the facts are stated in the opinion by WARD, Circuit Judge, as follows:

"From the month of May, 1901, down to the time of the accident, November 4, the defendant was using certain derricks and hoisting

machines, and also a dilapidated shed in a railroad yard at Pittsburgh, Pa. This yard covered about two acres of ground in the tenement-house district, near a public school attended by the infant plaintiff. In the shed, which was kept unlocked during the daytime, the defendant stored, among other things, barrels of oil with their heads knocked off, so that the oil could be dipped up. During the

In charging the jury upon this branch of the case the learned judge of the court below said: "I shall adopt the language of the late Judge Dixon, who charged the jury in a suit between those same parties when it was on trial in the Supreme Court of this State (New Jersey). Speaking of the public he said:

"The public consists of two classes for the present purpose of this suit: People grown up, adults, people come to years of discretion, and the little children, who have not yet come to years of discretion, who have not yet the ability to take care of themselves as older people do, and the law regards their rights and privileges in the streets as well as those of older persons, and when you are dealing with the safety of things in the street, you have to regard children as well as older people. The propensity of little children to play upon the street, and to rest from their play in the public streets, is one with which we are all more or less familiar, and that

whole of this period boys had been in the habit of taking oil from the barrels in tomato cans and other receptacles, and lighting it on the ground or throwing it on fires they had started. The parties stipulated, among other things, as follows:

"Defendant's night watchman testified, being called for the plaintiff, that, when he was going away at night, he would lock the shed to keep the boys from stealing the oil. He was watchman there from August preceding until after the accident. There was no direct evidence that the propensity of the boys to take the oil out of the shed and burn it was known to any of defendant's agents, except his night watchman."

"November 4, about four P. M., after school, the infant plaintiff went with some twelve other boys into the yard where a fire was built, on which the boys threw oil taken from the barrels in the shed. Some of the witnesses testified that the plaintiff was injured as the result of a can of oil being thrown on the fire by another boy, which ex-

ploded and covered him with burning oil. At least one witness testified that the boys were lighting the oil on the ground, and then running and jumping through it, and that the plaintiff was injured by oil which got on him while he was doing this."

After citing and quoting from *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657, (9 Am. Neg. Rep. 614-616) the court said:

"Knowledge of such a notorious and continuous practice as is shown in this case we think must be imputed to the defendant, and, were this not so, that the knowledge of the night watchman was the defendant's knowledge. Nothing is more attractive to boys than fire, and, as they had been for some six months in the habit of throwing the defendant's oil on fires made by them and this fact was actually known to his night watchman, we have no doubt that the question of the defendant's negligence was properly presented to the jury. The judgments are affirmed, with costs."

is also to be taken into consideration (and I may say by way of parenthesis that upon this trial there is evidence tending to show that little children were accustomed to play in the street in the vicinity of where the girders were placed both before and after they were placed), and if things are left in the street in such condition that they will tempt children to make use of them, either for play or for rest, and will be dangerous to little children if they do so make use of them, those things are not in proper condition.' "

This statement of the legal duty resting upon those in the situation of the defendant, we think is as sound as it is humane, and it is supported by decisions of the Supreme Court of the United States, as well as by numerous decisions of the State courts. These decisions are controlling in the present case. The leading case of *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 611-614, was a case in which the plaintiff, a child of tender years, was injured while playing with other children on a railroad turntable. This turntable was ordinarily held secure from movement by a heavy cast-iron latch. This latch had been for some time broken, so that the table could be easily turned on its pivots by the children who played on and near it. The turntable was on the uninclosed land of the railroad company. There was evidence tending to show that small children were in the habit of playing around and upon this turntable, to the knowledge of defendant's servants. Dillon, Circuit Judge, in the court below, had, in charging the jury on the question whether there was negligence on the part of the railroad company in allowing the turntable to remain in the condition in which it was, said:

"That to maintain the action it must appear by the evidence that the turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was on the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

The Supreme Court approved of this statement of the law, and decided that the case had been properly submitted to the jury. The

principle of this case has been adhered to by the Supreme Court in subsequent cases, as also by many cases in the highest courts of the States, and though there is some conflict in the decisions of the State courts, the decided weight of their authority is on the side of what has come to be called the "Doctrine of the Turntable Cases."

In *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, the railway company operated a coal mine, and was in the habit of depositing the slack on an open lot belonging to it, between the mine and the station, in such quantities that the slack was in a permanent state of combustion, a fact known to the servants of the company. The lot was open and unguarded. A lad of twelve years of age, in running across the lot, fell onto the slack and was badly burned. It was held that the lad was not a trespasser, under the circumstances, and had not been guilty of contributory negligence, and he was allowed to recover. Mr. Justice Harlan, in delivering the elaborate opinion of the court in this case, approves of the judgment in *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and quotes with approval the following from Judge Dillon's charge to the jury in that case:

"The machine in question is part of the defendant's road and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendant did know, or had good reason to believe under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence." Mr. Justice Harlan then proceeds as follows: "That charge was held by this court to be an impartial and intelligent one. And after observing that the jury were at liberty to find for the plaintiff, if from the evidence it could justly be inferred that the railroad company, in the construction, location, management or condition of the turntable, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow. Mr. Justice Hunt, delivering the unanimous judgment of this court, said:

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be

inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.'"

That this is recognized as the common law by the English courts is shown by Mr. Justice HARLAN's discussion of the cases of *Lynch v. Nurdin*, 1 Q. B. 29, 36; *Mangan v. Atterton*, L. R. 1 Ex. 239, and *Clark v. Chambers*, L. R. 3 Q. B. D. 327. See Pollock on Torts, 382, 383. The doctrine of those cases which relate to structures dangerous, as well as attractive, to children, maintained on defendant's own land, is *a fortiori* applicable to cases like the present, where the defendant has maintained the dangerous thing, structure, or condition upon a public street or highway.

The defendant, however, earnestly contends that the decision of the Court of Errors and Appeals of New Jersey, in *Friedman v. Snare & Triest Co.*, 71 N. J. Law, 605, 61 Atl. 401, is binding upon the court below and this court, and settles the law for this case. This contention involves the important question of how far decisions of a State court are conclusive upon the Circuit Courts of the United States in the exercise of their concurrent jurisdiction with State courts. This question has received the consideration from the Supreme Court which its importance demands. It is unnecessary to cite all the decisions in which that court has enunciated the principles by which determination of this question must be guided. These decisions have been founded upon the broad meaning and intent of article 3 of the Constitution, and of the legislation of Congress in pursuance thereof, conferring upon the Circuit Courts of the United States "original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or equity * * * in which there shall be a controversy between citizens of different States," and have been made in conformity to that spirit of comity and practical good sense by which, in the administration of this concurrent jurisdiction, "unseemly conflicts" with the State courts have been avoided. These principles, for our present purpose, may be summarized as follows:

There is no common law of the United States, and the thirty-fourth section of the Judiciary Act (Act Sept. 24, 1789, c. 20, 1 Stat. 92), as embodied in section 721 of the Revised Statutes (U. S. Comp. St. 1901, p. 581), provides: "That the laws of the several

States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

So that, in any trial at common law, a Circuit Court of the United States, where its jurisdiction is founded on diverse citizenship, has to inquire what the law of the State in which its jurisdiction is exercised may be, and it is the law of the State, whether statute or common law, that it is called upon to administer. So far as the constitutional or statute law of a State is concerned, the Constitution and statute speak for themselves, and it is a rule well settled that where a question arises upon the construction of a State Constitution or statute, the courts of the United States will feel themselves bound by the construction given to them by the Supreme Court of the State. So, also, as to what may be the common law of the State, as applicable to a case before a Federal court, the ordinary evidence is to be found in the decisions of the State's tribunal of last resort.

The question in the class of cases we are now considering, being what the law of the State is, which is to be administered by the court, if there can be found in the decisions of the highest court of that State intrusted with the construction of statutes, and the interpretation and application of its common law, a well-settled rule, that generally will be deemed the law of that State. Especially is this true whenever the decisions of the State courts relate to some law of a local character which may have become established by those courts as part of the law of the State. And generally, where in an ordinary trial, in an action at common law in a United States court, we speak of the common law, we refer to the common law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights, so that, though a United States Circuit Court, having jurisdiction in a given State, is an independent forum, and distinct from that of the State, it administers no new or different law from that administered in the State court. But the jurisdiction exercised by those Federal courts in such cases is concurrent and not subordinate, and they are called upon to exercise, and do exercise, an independent judgment as to what the law of the State may be.

As to the constitutional and statute law of a State, and the construction given thereto by the highest State tribunals, there is little or no difficulty. And as to what the common law of a State may be, the best evidence is generally found in the settled line of de-

cisions of the State court, so accepted and recognized as to constitute a general rule of property or conduct. More latitude, however, is practiced in questions that depend upon a common law, not merely part of the local and customary law of the State, but common to all States and countries where what is known as the "common law" prevails. On these questions the courts of the United States do not hold themselves bound by the decisions of the courts of the State, unless, perchance, such decisions have so clearly established a settled rule in the premises as to make it part of the peculiar and local law of that State. In deciding what the common law of a State may be, they will resort to the same sources of information as are open to the State courts, and find the evidence of the law where the State courts must seek it, in that general jurisprudence of which we have spoken. State courts are accustomed, in discussing such questions, to refer not only to decisions of their own States, but to those of other States in this country, as well as to decisions in that country from which we originally derived the common law. The Circuit Court of the United States may, therefore, in forming their independent judgment in questions where the common law of the State is derived from the principles of general jurisprudence common to all the States, at times feel compelled to differ from the conclusions arrived at by the State court. In other words, they may differ from a State court in determining what the common law of the State, thus derived and applicable to the given case, may be. *Swift v. Tyson*, 16 Pet. 1, 8.

It is to be remembered, however, that this diversity of opinion will not be indulged in by the courts of the United States where, as we have just said, in the ordinary administration of the law of the State courts, and by the settled course of their decisions, certain rules are established which have become rules of property and conduct in the State, and have all the effect of law, which it would be wrong to disturb. *Burgess v. Seligman*, 107 U. S. 20, 37, 2 Sup. Ct. 10; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974; *Etheridge v. Sperry*, 139 U. S. 267, 275, 11 Sup. Ct. 563.

This contention makes it necessary to refer to the somewhat peculiar history of the litigation between the parties of this suit, as disclosed in the record. From the facts stated in the fifth plea filed by the defendant, and afterwards stricken out by the court upon motion of the plaintiff, it appears that the defendant in error, Fannie Friedman, and her father, Samuel Friedman, on July 20, 1903, brought two separate actions against the present plaintiff in error, in the Supreme Court of New Jersey, to recover damages for

the same injury and upon the same state of facts which the present action was brought in the court below. The two actions came on for trial, and by stipulation and consent were tried as one before a justice of the Supreme Court and a jury. A verdict was rendered in favor of Fannie Friedman for \$7,000, and for Samuel Friedman, who sued *per quod servitium amisit*, for \$800. On the judgment in the case of Samuel Friedman a writ of error was sued out by the defendant company from the Court of Errors and Appeals of the State of New Jersey, and in Fannie Friedman's case a judgment *nisi* being entered, a rule to show cause why the verdict should not be set aside was granted, returnable before the New Jersey Supreme Court. The Samuel Friedman case was duly argued before the said Court of Errors and Appeals, and the judgment appealed from was finally reversed. The ground of this reversal, as stated in the opinion of the court, was that the defendant company owed no duty to the children of tender years to whom to its knowledge these piles of beams might be attractive for playing upon or resting upon, to keep them in a reasonably safe condition, other than it owed to those who were *sui juris*. It was held that Fannie Friedman was a trespasser upon these materials of the defendant, and that for the injury suffered by her, as such, no cause of action or recovery could accrue to her father.

After this judgment of the Court of Appeals, in the case of Samuel Friedman, as was inevitable, the rule to show cause why a new trial should not be granted in the case of the infant plaintiff against the same defendant was made absolute by the trial court, and the suit was thereafter discontinued by plaintiff, and a new action was brought in the court below, the judgment and record in which, by writ of error, are now before this court for review. The objection made by plaintiff in error that the suit in the State courts barred the right of action in the second suit in the United States court, does not seem to have been seriously pressed, and requires but a word in passing. *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, was a case where a nonsuit in the State court had been granted on defendant's motion and a new action was subsequently instituted in the Circuit Court of the United States, where it was contended that the former judgment was a bar and a request made to direct a verdict for defendant. The court denied the request and overruled the objection. Upon error to the Supreme Court these rulings were held to be correct, and that "a trial upon which nothing was determined cannot support a plea of *res judicata* or have any weight as evidence at another trial." And in *Gardner*

v. Mich. Cent. R. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, the plaintiff sued defendant in the State court of Michigan, and a verdict and judgment were in plaintiff's favor. This judgment was reversed by the Supreme Court of the State, and a new trial ordered. When the case was remanded plaintiff voluntarily withdrew his action, and then commenced suit in the Circuit Court of the United States on the same cause of action. The defendant contended that the plaintiff was precluded from bringing this action by the judgment in the State court, rendered for the same cause of action and on the same state of facts. This contention was overruled by the Circuit Court of the United States, and the Supreme Court of the United States, in the case cited, held that this ruling of the Circuit Court was correct.

We recur, therefore, to the contention that the decision of the Court of Errors and Appeals of New Jersey in *Friedman v. Snare & Triest Co.*, 71 N. J. Law, 605, 61 Atl. 401, is binding on this court, and settles the law of this case. We have already stated at sufficient length the principles that should guide this court in determining how far it should consider itself bound by this decision of the Court of Errors and Appeals of New Jersey. The question whether the defendant owed any duty as respected the children of tender years on said street and near piles of beams, which to the knowledge of the defendant had proved attractive to such children to rest and play upon, other than and different from that which it owed to persons using street and who were *sui juris*, was clearly a question of the common or unwritten law of the State of New Jersey. It was not a question of statute law, or of title to land, or of merely local law or custom, but belonged to that domain of jurisprudence to which we have above alluded, which prevails generally in all States and countries where the common law is recognized, and is so often referred to in the decisions of the Supreme Court. It is well settled that the general question of liability for negligence, when not modified or regulated by statute law, belongs to this domain.

In *Gardner v. Mich. Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, Chief Justice FULLER, in speaking for the Supreme Court, says: "But in the present case only the responsibility of a railroad company to its employees was involved, and it is settled that that question is a matter of general law, and that in the absence of statutory regulations by the State in which this cause of action arose this court is not required to follow the decisions of the State court. *N. Y. Cent. R. Co. v. Lockwood*, 17 Wall. 357, 10 Am. Neg. Cas.

624; *Hough v. T. & P. R. Co.*, 100 U. S. 213; *Myrick v. Mich. Cent. R. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425; *Lake Shore, etc., Ry. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261; *Balt. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914."

In ascertaining what this unwritten or common law prevailing in New Jersey, as well as widely elsewhere, requires in the premises, the court below had the right to exercise its independent judgment. In doing so it might explore the sources and scrutinize the evidence of that law precisely as the State court has done. However reluctant it may be to differ with, it was not bound by the decision of the State court in such a case, although judicial comity might require it to bow to a line of decisions so uniform and well settled, and extending through so long a time, as to establish a rule of conduct which "it would be wrong to disturb." The only question then is, was the judgment of the Court of Errors and Appeals of New Jersey, in the case referred to, declaratory of a rule so established as to be peculiar to that State? In accordance with the principles above stated, its decision that the title of the abutting owners on a street in New Jersey extend to the middle thereof, subject to the public easement, and that by the law of that State such abutting owners have the right to the temporary and reasonable use of the street for storing materials to be used in building and repair of structures on such abutting land, as a matter of local law, should be and was respected as conclusive by the Circuit Court, especially as its decision in this respect was supported by the authority of a uniform line of State decisions.

With reference, however, to the general question of negligence, and the duty owed under the circumstances by defendant to plaintiff, the only New Jersey cases referred to by the learned justice who delivered the opinion of the Court of Errors and Appeals are the cases of *Turess v. N. Y., Susq. & West R. R. Co.*, 61 N. J. Law, 314, 4 Am. Neg. Rep. 520, 40 Atl. 614, decided by the Supreme Court, and *Del., L. & W. R. R. Co. v. Reich*, 61 N. J. Law, 635, 4 Am. Neg. Rep. 522, 40 Atl. 682, decided by the Court of Errors and Appeals.

The case first cited was in the Supreme Court, not the court of last resort. It was a turntable case, and squarely took issue with the doctrine of *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and the "Turntable Cases," so called, that have followed it. The case was decided in 1898, and it was said by Chief Justice MAGIE, who rendered the opinion, that the question was for the first time presented for consideration to the courts of New Jersey.

The second case was in the Court of Errors and Appeals, and was also a turntable case. Mr. Justice GUMMERE, in delivering the opinion of the court, in speaking of the doctrine of the "turntable cases," says that: "Although this doctrine has received the support of many courts of high distinction, it has been absolutely repudiated by other courts whose decisions rank equally high." He also says that "this court," the Court of Errors and Appeals, "has up to the present time never been called upon to decide the question, and we are free to adopt either the view taken by the United States Supreme Court in *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and the cases which have followed it, or that taken by" other courts. It was accordingly held by the court that the owner of the turntable and of the land on which it was built owed no duty to a child of tender years, who was hurt by playing thereon, on the ground that it was a trespasser at the time of the accident.

In addition to these, counsel for the plaintiff in error has referred us to the cases of *Isaacs S. Vanderbeck v. Hendry*, 34 N. J. Law, 467, 16 Am. Neg. Cas. 665 n; *Fitzpatrick v. Cumberland Glass Co.*, 61 N. J. Law, 376, 39 Atl. 675, and *Taylor v. Haddonfield & C. J. Turnpike Co.*, 46 Atl. 707. These cases all refer to the duties of landholders with reference to persons *sui juris* who enter upon their lands as licensees, and do not at all touch the question with which we are here concerned. It is evident, therefore, that there is no such settled rule of law established by the decisions of the New Jersey tribunal of last resort as would be binding upon the United States Circuit Court or relieve it from the duty of forming an independent judgment as to what the unwritten or common law of New Jersey required of the defendant in the premises. That the law was not so settled in New Jersey is further evidenced by the strongly reasoned dissenting opinion of FORT and BOGERT, JJ., in the case of *Samuel Friedman v. Snare & Triest Co.*, 71 N. J. Law, 605, 61 Atl. 401, and by the view taken by that eminent jurist, the late Mr. Justice Dixon, in the trial of this same case in the Supreme Court, and whose opinion, as approved by the learned judge of the court below, we have already quoted. With the highest respect for the Court of Errors and Appeals of the State of New Jersey, and for the learned members of that court who announced its opinion in the case referred to, we are compelled to the conclusion that the rule of law, as announced in the case of *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657, 9 Am. Neg. Rep. 614-616, and in the subsequent approving cases, is the law applicable to the present case, and the assignments of error in that regard must be overruled.

It is only necessary in conclusion to refer briefly to the contention of the plaintiff in error, that because the case of *Snare & Triest Co. v. Samuel Friedman* (71 N. J. Law, 605, 61 Atl. 401), in the Court of Errors and Appeals of New Jersey, grew out of the identical facts and circumstances upon which the present case is founded, it was in some peculiar sense binding upon this court, as well as upon the court below. In view of what has already been said, we can give no weight to this suggestion. It still remains a matter in which two courts of concurrent and independent jurisdiction have arrived at a different view of the law.

In the case of *Bucher v. Cheshire R. R. Co.*, 123 U. S. 555, 8 Sup. Ct. 974, the plaintiff in error was plaintiff below in the Circuit Court of the United States, and sought to recover from defendants for injuries he sustained by reason of their negligence while traveling upon their roads. The court on the trial substantially instructed the jury that the plaintiff could not recover, because the injury complained of occurred while he was traveling upon the Sabbath day, in violation of the law of the State of Massachusetts. A suit between the same parties in regard to the same transaction had been brought in the Supreme Court of that State in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in banc, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the State court, and brought his action in the Circuit Court of the United States. Mr. Justice MILLER, in delivering the opinion of the Supreme Court, discussed the general question as to the binding effect of decisions of the State courts upon the courts of the United States, and we have already cited a passage from his opinion. He nowhere, however, gives any weight to the fact that there had been an opinion of the Massachusetts court of last resort in the very case then before the Supreme Court, but confines himself to the inquiry, whether any settled rule in the premises had been established by the decisions of the Massachusetts courts. He concludes as follows: "The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject."

In the case at bar no statute of the State was involved.

As we have seen in the case of *Gardner v. Mich. Cent. R. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, there was the same situation to be

dealt with. The Supreme Court of the United States refused to be bound by the decision of the Supreme Court of Michigan, on the same facts and between the same parties, and said: "We conclude, therefore, that the opinion of the State Supreme Court should be given only such weight as its reasoning and the respectability of the source from which it proceeds entitles it to receive."

Nearly all the other contentions founded upon the assignments of error are disposed of by what we have already said, and as to those that are not so disposed of, we content ourselves with saying that they are without merit and present no reversible error. We think the questions we have discussed were properly submitted to the jury by the learned judge of the court below, and the judgment below is therefore affirmed.

KERNODLE v. ELDER.

Supreme Court, Oklahoma, May, 1909.

1. PHYSICIANS AND SURGEONS — MALPRACTICE — EVIDENCE.

— In an action against a physician for malpractice in the setting and treatment of a fractured limb where there is no guaranty of cure or contract for extraordinary skill or care, and where the evidence fails to show that the results are not such as usually and ordinary result in such cases where treated by an ordinarily skilful physician using ordinary care, then there is a failure of proof, and plaintiff is not entitled to recover (1).

1. *Actions for malpractice.* — In *SAMEULS v. WILLIS*, (*Kentucky*, April, 1909) 118 S. W. 339, judgment for plaintiff for \$3,500 in the Circuit Court, Barren county, was *affirmed*, the facts of the case being stated in the opinion by O'REAR, J., as follows:

"Appellant is a surgeon of many years' experience in performing abdominal operations. His office and residence are at Louisville. He was called to Glasgow Junction to operate on appellee for ovaritis. Appellee had been very sick for some months, and, the local doctors advising the operation and recommending appellant, she decided to have

him do the work. He sent down a trained nurse and followed next day with a medical student as assistant. Several doctors of the neighborhood came in to witness the operation. After the patient had been put under the influence of an anæsthetic, the abdomen was opened by a five or six inch incision, the intestines were pressed aside from the infected region, and in order that they might be held in place, and so as not to interfere with the operator's work, a number of surgical sponges were inserted in the abdominal cavity, forming a kind of cofferdam about the organ to be operated upon. These sponges are described as

2. APPEAL AND ERROR — REVERSAL. — Where in such a case it is apparent from this record that the claim of plaintiff cannot be sustained on reversal the court will not remand for a new trial, but will direct a dismissal.

(*Syllabus by the Court.*)

gauze cloths about fourteen inches by six inches, stitched together. After the operation the sponges were intended to be removed and the cut in the abdomen drawn together by stitches, leaving a small opening in which was inserted strips of the gauze for drainage purposes. The operation was thought to have been a success, but the patient did not respond by the anticipated recovery. Instead, after a few days, she grew worse. Finally, and in about thirty days after the operation, it was discovered through a part of the original opening made in the abdomen that some foreign substance was lying near the surface, which on being removed was discovered to be one of the surgical sponges used at the operation. So it is claimed by appellee. It was incrustated in and saturated with foul-smelling pus. After its removal the patient improved in health, but there was left a sinus, which it is claimed has developed into a fecal fistula. Appellee brought this suit against appellant, charging malpractice, in that he negligently left or suffered to be left in her person after the operation the surgical sponge, which irritated the intestines, causing them to fester and ulcerate, creating the fistula, which emitted fecal matter and noxious gases to the serious impairment of her health, and causing her sickness and humiliation, mental and physical suffering, for which she sought damages. The trial resulted in a verdict and judgment for \$3,500 for the plaintiff." * * *

In *MILLER v. LEIB*, (*Maryland*, January, 1909) 72 Atl. 466, judgment

for plaintiff in the Baltimore City Court in an action for malpractice was reversed for errors in overruling defendant's objections to certain hypothetical questions and answers thereto and in giving a prayer which ignored certain evidence. The facts of the case are stated in the opinion by SCHMUCKER, J., as follows:

"There is evidence in the record tending to show the following state of facts: The appellee, Mrs. Leib, a widow of slender build, sixty-one years old, fell and fractured a femur while walking across her bedroom at noon of Saturday, November 19, 1905. She was then residing with her adopted sister, Mrs. Burke, at Irvington, a suburb of Baltimore city, distant three-quarters of an hour from the office and sanitarium of the appellant, Dr. Miller, in the city. At about one o'clock Mrs. Burke's daughter called up Dr. Miller's office on the telephone, and mentioned Mrs. Leib's accident, and requested him to come to see her. Some one, who said that he was Dr. Miller, answered the call, saying he could not come at once, but promised to come, as requested, after he closed his office. Miss Burke was unacquainted with the doctor, and therefore could not identify as his the voice which answered her over the telephone. The doctor not appearing soon, Mrs. Burke, who knew him, called him up over the phone at seven o'clock in the evening, and received a reply, which she recognized as being in his voice, promising to come as soon as his office hour was over. He arrived at Mrs. Burke's after nine o'clock, and pro-

ERROR from Probate Court, Logan County.

ACTION by James B. Elder against J. D. Kernodle. From judgment for plaintiff, defendant brought error to the Supreme Court of the Territory. Case transferred to the Supreme Court of the State, and, on death of plaintiff, the action was revived in the name of Sarah M. Elder, administratrix. The case is stated in the opinion. *Remanded, with instructions to dismiss.*

ceeded to make a physical examination of Mrs. Leib. The evidence as to the nature and extent of this examination is conflicting. Of those who witnessed it Mrs. Burke thought it was brief and casual; her son, Wm. B. Burke, thought it was pretty thorough; his wife said that the doctor made no other examination than to bare the patient's leg to the hip and pull and twist it, and then told her to lie perfectly quiet and rest, that quiet and rest were what she needed. The plaintiff's own account is as follows: 'I told him how I suffered. He took my clothing off, and examined my foot, and did this way and this way (very gently). He examined it, I suppose, for about ten or fifteen minutes, and then said, "You have ruptured a muscle." I said, "Doctor, it hurts me so dreadfully," and he said, "You have ruptured a muscle, and it is the most intense agony there is, but nothing very serious," and that after a few days it would heal if I would lie quiet. He fixed me, and put his hand on the bed, and said, "Lie quiet, you don't need any medicine or attention, but lie quiet."' Dr. Miller, on the contrary, testified that he gave the patient a very careful and thorough examination, stripping and comparing and measuring her limbs according to the usual methods, and moving and handling the injured one as far as desirable, and found neither shortening nor eversion of it, and that it was impossible to tell at that time whether the thigh was

fractured or not. He said that, in either event, the proper treatment was that which he prescribed of keeping the leg quiet and in line. He put a pillow at her foot, and told her to keep in position the salt bag which had been put on the outside of her hip before his arrival. The doctor did not see Mrs. Leib again until Monday evening, when he prescribed the use of sand bags to keep her injured leg in a straight position and quiet, and also gave her a sedative medicine internally. He came to see her again on Thursday, and, after re-examining her physically, proposed to her to be removed to his sanitarium in Baltimore city at his residence, where he said she could receive better attention. She assented to the proposition, and on the following day was taken to the sanitarium, where she remained under the doctor's care from November 24th to February 21st, when she left it in a lame condition, with her fractured femur still ununited. While she was at the sanitarium she was kept in bed in a room with open windows, and her leg was held in a position by the use of sand bags. Two efforts were made to treat the leg surgically—first, by the application of a side fixation splint and extension, and afterwards by a plaster cast and extension, but she was unable to endure either of them. According to Dr. Miller's uncontradicted testimony her temperature went up to 105 degrees within forty-eight hours after the application of

COTTERAL & HORNER, for plaintiff in error.

LOWRY & LOWRY, for defendant in error.

DUNN, J. — This action was begun by James B. Elder filing his petition in the Probate Court of Logan county, Territory of Oklahoma, on June 5, 1905, wherein he alleged that on or about the 1st of February, 1905, he fractured the bone of his right hip joint, and that the defendant holding himself out as a physician and surgeon, and being in the general practice of medicine for hire in

the splint, and he considered her desperately ill, and took off the splint and lightened the extension weight. After her general condition had improved, the plaster cast and extension were put on her and retained in position for seventeen or eighteen days, during all of which time she was uncomfortable, and constantly begged for their removal, and her general condition became so bad that the appliances were taken off. Dr. Miller paid her one visit after she left his sanitarium. About two weeks thereafter Mrs. Leib called in Dr. Finney, a distinguished surgeon, who performed an operation on her, removing the broken end of the femur, and making a new thigh joint. Since recovering from the operation, she has enjoyed a fair use of the injured leg, but, as it was somewhat shortened by the operation, she will always be somewhat lame.

"There is much testimony in the record tending to show that Mrs. Leib had been suffering from tuberculosis for some years prior to her accident, and that the disease became acute after the accident. She said that Dr. Miller had been her regular physician ever since 1894, and he testified that he had on two occasions attended her for attacks of hemorrhages from the lungs, the last being in December, 1904, when she had a quite severe attack; that, when he saw her the second time at Mrs. Burke's, after the accident, her cough was decidedly worse and her tem-

perature 103; that she had bronchial pneumonia in both lungs when she arrived at his sanitarium, and that, while she was there, he had frequent examinations of her sputum made and found it filled with tubercular bacilli, and he was compelled to report her case to the health board as tubercular. Miss Ford and Miss Haney, two of the nurses who attended her at the sanitarium, both testified that she told them that she had consumption for twenty years, and that her mother had died of it. The same witnesses testified that she had a very bad cough and profuse expectoration when she came to the sanitarium. Dr. Miller further testified that at his second visit to Mrs. Leib after her accident he discovered that her femur had been fractured, but that her general condition was such that he thought it inexpedient to attempt at once to apply splints or a plaster cast to her for the relief of her leg. As against this evidence, Mrs. Leib's family and friends who had known her for some years, and who visited her at the sanitarium, testified that they regarded her general health prior to the accident good, and that her illness at the sanitarium was produced by the cold air and drafts in the room in which she was kept and the insufficient covering on her bed. Some of these witnesses also thought that the doctor had been brusque in manner and indifferent in his treatment of Mrs. Leib, and that he displayed lack both of knowledge

Logan county, was employed to set such fractured bone and to attend his said injury. The defendant was charged with having negligently and unskilfully diagnosed the difficulty, in that he dressed and bandaged plaintiff's limb as if the break were between the knee and the hip, and as though the fracture were in the vicinity of the knee, and that by reason of this error on his part the fracture itself was left wholly unattended and uncared for. That this was careless, negligent, and unskilful on the part of defendant and that by

and skill in that connection, failing to ascertain the true nature of her injury or to give her case intelligent or skilful attention. We express no opinion upon the weight of the evidence in the case; that being a question for the jury. We have referred to portions of it merely as explanatory of our action upon the legal propositions presented by the case."

* * *

After reviewing the evidence the court said:

"We have several times passed upon the degree of care and skill required of attending physicians or surgeons toward their patients. In *State (Use of Janney) v. Housekeeper*, 70 Md. 171, 16 Atl. 384, we used the following language: 'It was the duty of the professional man to exercise ordinary care and skill, and, this being a duty imposed by law, it will be presumed that the operation was carefully and skilfully performed in the absence of proof to the contrary. As all persons are presumed to have duly performed any duty imposed on them, negligence cannot be presumed, but must be affirmatively proved. *Best on Presumption*, p. 68. *Railroad Co. v. Chappell*, 21 Fla. 175. This principle is especially applicable in suits against physicians and surgeons for injuries sustained by reason of alleged unskilful and careless treatment. The burden of proof is on the plaintiff to show a want of proper knowledge and skill.' In *Dashiell v. Griffith*, 84

Md. 380, 35 Atl. 1096, we again said upon the same subject: 'The law is settled in numerous well-considered cases that a physician or surgeon who holds himself out to the world to practice his profession by so doing impliedly contracts with those who employ him that he possesses a reasonable degree of care, skill, and learning, and he is therefore bound to exercise and is liable for the want of reasonable care, skill, and diligence, and he is responsible in damages arising as well from want of skill as from neglect in the application of skill. * * * The cases are generally agreed upon the proposition that the amount of care, skill, and diligence required is not the highest or greatest, but only such as is ordinarily exercised by others in the profession generally.' * * *

"The plaintiff's second prayer, which was granted generally, was an amplification of the first prayer, but was predicated especially upon the finding by the jury of the commission by the defendant of certain specified mistakes in the diagnosis of the plaintiff's condition and want of care and skill in specified respects in the treatment of her case. This prayer also was entirely silent as to the important evidence touching a tuberculous condition of the plaintiff, and had, therefore, the practical effect of withdrawing from the consideration of the jury the evidence reflecting upon facts, not mentioned in the prayer, which if believed by them,

reason thereof plaintiff suffered great pain, and that the broken bone has knit together improperly in such a manner as to leave plaintiff crippled and lame, and to render him a permanent cripple for life. Damages were prayed for in the amount of \$1,000. To this petition defendant answered by filing a general denial, and on the trial thereof before a jury a verdict for damages in the amount of \$500 was returned. Judgment was rendered thereon, motion for

would have defeated the plaintiff's right of recovery. A plaintiff's prayers need not negative every theory of defense finding support in the evidence, but prayers asserting a plaintiff's right to recover upon the finding by the jury of certain facts, which if standing alone would justify a verdict in his favor, but ignoring the evidence tending to establish other and inconsistent facts, have been repeatedly held by this court to be misleading and erroneous. *Corbett v. Wolford*, 84 Md. 428, 35 Atl. 1088; *Bank of Bristol v. B. & O. R. R.*, 99 Md. 682, 50 Atl. 134; *Haines v. Epply & Pearce*, 41 Md. 234; *Kennedy v. Co. Com'rs*, 69 Md. 71, 14 Atl. 524; *Adams v. Capron*, 21 Md. 205; *B. & O. R. R. v. Shipley*, 31 Md. 370, 371."

In *GORE v. BROCKMAN*, (*Missouri Appeals, Kansas City*, May, 1909) 119 S. W. 1082, judgment for plaintiff in the Circuit Court, Miller county, was reversed. *ELLISON, J.*, stated the facts as follows:

"Defendant is a physician, and plaintiff was his patient. She charged malpractice and recovered judgment in the trial court for \$3,500. The petition alleges: That plaintiff was suffering from some 'malady,' and that she engaged defendant to treat her. That defendant pronounced her trouble to be 'the hardening of the right lobe of the liver and proposed to treat her by means of what is generally known as an X-ray machine.' That defendant 'unskillfully, rashly, unprofessionally, negligently,

and ignorantly commenced treating her with the X-ray.' That in so doing the 'right side of the abdomen for a space of more than one foot in diameter was blistered and became raw and sore,' etc. The petition then, among other things, sets forth the serious and distressing consequences following such treatment.

"Defendant was a witness in his own behalf, and on cross-examination plaintiff's counsel was permitted to ask him, over the objection of his counsel, the following question: 'Doctor, I will ask you if on or about that date [the time when plaintiff's condition became serious] you didn't take out what is called "doctor's protective insurance" to guard you against damages that might accrue from this or any other suit for malpractice?' The defendant answered that he carried insurance of that kind. The question was improper and was highly prejudicial. The issue on trial was negligent treatment of plaintiff by defendant as her physician, and indemnity insurance would not aid in determining that question; but, more than that, its tendency and effect was to withdraw the real defendant from the consideration of the jury and to substitute for him an insurance company. A litigant has a right to his own personality, and the opposing party has no right to have the consideration of his claim influenced or measured by any other standard, so far as individuality is concerned, than that afforded by the party of

new trial filed and overruled, and the cause was taken to the Supreme Court of the Territory of Oklahoma by petition in error and case-made, and is now before us for our consideration by virtue of our succession to that court, under the terms of the Enabling Act and schedule to the Constitution. After the argument and submission of this cause, which stood on the docket of this court as *J. D. Kernodle v. James B. Elder*, the death of the defendant in error was

whom he complains. He cannot ask unliquidated damages of a good man who may have injured him and then substitute a bad man at the trial. The subject has been before the courts, and similar questions have been condemned. *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Manigold v. Black River Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861; *Barrett v. Bonham Oil Co.*, (Tex. Civ. App.) 57 S. W. 602; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Fuller Co. v. Darragh*, 101 Ill. App. 664; *White's Supp. Thompson on Neg.*, § 7275a. * * *

"The first instruction submits, among other things, whether X-ray treatment 'was in accordance with the ordinary and established practice of the medical profession for the treatment of the disease from which plaintiff was suffering.' The proper submission of that question as raised by the petition is whether an ordinarily skilful and prudent physician would have adopted that treatment in the circumstances which confronted him when he applied it. Of the instructions asked by defendant, two were refused which informed the jury that defendant as a physician should not be held as an insurer of the success of treatment 'by the X-ray process,' or that it would not be attended by unexpected results, and that he was only required to have the necessary learning and experience to give the treatment in a careful and prudent manner. These

instructions were proper and should be given on another trial, unless the issue is clearly tendered that there was negligence or unskilfulness in prescribing such treatment at all. If that is an issue, then the instructions should also cover that phase, for a physician might be fully equipped in learning, skill, and care to use the X-ray, and yet use it in a case where a prudent physician would not have adopted it as a remedy. For instance, a surgeon might possess great learning and skill, and when performing a certain operation might be as careful as possible, yet it might be that a prudent and skilful man of that profession, in the same circumstances and conditions, would not have performed such an operation. On the subject of direction to the jury in cases of this character, it may be stated to be the law that a physician is not to be held for honest error of judgment. He is only required to give his patient his diligent attention and best thought, and in prescribing, administering, or applying treatment, to use that care, skill, and prudence that an ordinary capable doctor would use in the same or like situation and condition or circumstances. *Wheeler v. Bowles*, 163 Mo. 398, 63 S. W. 675. Otherwise, in view of the fallibility of all men, we would require of him more than can justly be demanded. The issue which one should tender who seeks to hold a physician liable in damages for malpractice is incompetency or negligence, or both. As to which of

suggested, and the action has been revived in the name of J. D. Kernodle against Sarah M. Elder, administratrix of the estate of James B. Elder, deceased.

A motion to dismiss was filed on the grounds that the case-made was not properly a part of the records of this court, and that the motion for new trial was overruled at the request of plaintiff in error, and also the petition in error was not filed within one year.

these, or whether both, should be charged, must, of course, depend upon the case; but, at all events, the charge relied upon should be distinctly made so that confusion may not result." * * *

Rehearing denied, June 14, 1909.

In *BOUCHER v. LAROCHELLE*, (*New Hampshire*, February, 1908) 68 Atl. 870, defendant's exceptions to denial of motion for a nonsuit were *overruled*. The facts of the case are stated in the opinion by PARSONS, CH. J., as follows:

"The defendant was employed to set a broken bone in the arm of the plaintiff's child, an infant of the age of seventeen months. For the purpose of the operation he administered chloroform, and before the operation was completed the child died. The plaintiff offered evidence tending to show that death may result from the negligent administration of chloroform, and of the defendant's lack of care in administering it likely to produce this result. While the evidence was not without contradiction, and was not entirely clear and convincing, it cannot be said there was not some evidence tending to establish each of these propositions. There being some evidence, the question of its weight was for the jury. It was for them to determine what amount or weight of competent evidence was sufficient or insufficient to convince their minds and warrant them in determining the matter of fact in dispute. *Deschenes v. R. R. Co.*, 69 N.

H. 285, 289, 46 Atl. 467; *Felch v. R. R. Co.*, 66 N. H. 318, 323, 29 Atl. 557; *Fuller v. Rounceville*, 29 N. H. 554, 563, 564. From these facts, in the absence of other sufficient cause for the child's death, the jury could infer that the death resulted from the defendant's lack of care. There would be a direct and visible connection between the negligence charged and the injury complained of." * * *

Mistake of druggist in prescription. — In *SCHERER v. SCHLABERG ET AL.*, (*North Dakota*, September, 1909) 122 N. W. 1000, judgment for defendants in the District Court, Grand Forks county, was *affirmed*, the facts and points decided being stated in the syllabus by the court (opinion by SPALDING, J.), as follows:

"1. In an action by a father for the death of a minor child by wrongful act of defendant, the measure of damages recoverable by the father is the probable value of the services of the child during minority to the father, considering the cost of support and maintenance during the early and helpless part of its life.

"2. In an action by a father for damages for the wrongful death of a daughter three months old, who is dangerously ill with uremia when the wrongful act complained of was committed, the question of the pecuniary injury of the father by the death of such child, if caused by the wrongful act of defendant, is purely a matter of speculation, conjecture, and guesswork, and any verdict for

This motion was overruled on the 25th day of June, 1907, by our predecessor, and the ruling will not be reviewed here.

Plaintiff in error relies upon one proposition to secure reversal, which is, "that the verdict and judgment are not sustained by sufficient evidence." To the issues thus raised, both parties have filed very full briefs, and the court has had the benefit of an able oral argument on the part of counsel, all of which have had our best attention and consideration. The record of the trial as presented

more than nominal damages in favor of the father would necessarily be based upon conjecture or speculation.

"3. The child, damages for whose death by wrongful act of defendants are sought in this action by the father, was a girl three months old, dangerously ill with uremia. A physician was called, and left with the parents a prescription on defendant's drug store for medicine. By mistake of the defendant druggists, medicine was given plaintiff containing one-eighth of a grain of morphine in each dose directed to be given. The infant afterward died. *Held*, under the evidence, that the jury, had the case been submitted to it for a verdict, could only have found a verdict for plaintiff based upon pure speculation and surmise as to the cause of the child's death.

"4. When the nature of the evidence, in an action for damages, is such that no verdict for the plaintiff can be returned except based upon mere conjecture, surmise, or speculation, it is proper for the trial court to direct a verdict for the defendant.

"5. In an action under the statute providing for the recovery of damages for death by wrongful act of the defendant, the contributory negligence of the plaintiff beneficiary is a defense.

"6. The prescription of an attending physician called for medicine in the form of a powder, to be given, one every three hours, to an infant three months old. The prescription

was left with the mother of the child, and she was informed by the physician that it would be in powder form, and to give a dose once in three hours. By mistake of the defendant druggist medicine, put up for another customer, in liquid form, the label on the bottle being marked with the name of the party for whom it was prescribed, and containing directions to give one teaspoonful every two hours until relieved, was delivered. The plaintiff father was not present when the information and the directions were given the mother by the doctor, but before any of the medicine was given was informed by the mother what the directions were. He also read the directions on the bottle, and knew that the prescription given had been for a powder. He was present when the liquid was administered to the child, and permitted it to be done. After the first dose was given, and when nearly time for the second dose to be administered, he suspected something wrong in the medicine, and telephoned the doctor from the residence of a neighbor. He left his home to telephone without imparting his suspicions to his wife, or directing her to delay the second dose until he had heard from the doctor, and the second dose was given before his return. *Held*, that under these facts, and others disclosed by the record, the plaintiff was guilty of contributory negligence in law." (ELLSWORTH, J., dissented.)

here is unusually free of irrelevant or immaterial matter. The issue before the court and the jury was closely adhered to by counsel, and the instructions of the court are exceptionally lucid and comprehensive. All of these things tend to render it easier for us to determine the precise proof in the case, and to ascertain and determine whether or not the verdict rendered was in fact legally sustained by the evidence.

Let us first notice the law governing the responsibility of physicians and surgeons in cases of this character. The general rule is quoted in volume I of Witthaus & Becker's Medical Jurisprudence, Forensic Medicine and Toxicology, at page 30, wherein the authors of this work adopt the rule as laid down in Shearman & Redfield's work on the Law of Negligence, para. 433-435 (para. 605-607, inclusive [4th Ed.] Shearman & Redfield on Negligence).

"Although a physician or surgeon may doubtless by express contract undertake to perform a cure absolutely, the law will not imply such a contract from the mere employment of a physician. A physician is not an insurer of a cure, and is not to be tried for the result of his remedies. His only contract is to treat the case with reasonable diligence and skill. If more than this is expected, it must be expressly stipulated for. * * * The general rule, therefore, is that a medical man who attends for a fee is liable for such want of ordinary care, diligence, or skill on his part as leads to the injury of his patient. To render him liable it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary result. * * * But a professed physician or surgeon is bound to use not only such skill as he has, but to have a reasonable degree of skill. The law will not countenance quackery, and although the law does not require the most thorough education or the largest experience, it does require that an uneducated, ignorant man shall not, under the pretense of being a well-qualified physician, attempt recklessly and blindly to administer medicines or perform surgical operations."

The rule as adopted by the Supreme Court of Oklahoma Territory is announced in the case of *Champion v. Kieth*, 17 Okl. 204, 87 Pac. 845, wherein, on the authority of numerous cases cited, Mr. Justice PANCOAST, in a well-considered opinion, says of the practicing physician: "He is never considered as warranting a cure, unless under a special contract for that purpose. His contract, as

implied by law, is that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by others of his profession; that he will use reasonable and ordinary care and diligence in the treatment of the case which he undertakes; and that he will use his best judgment in all cases of doubt as to the proper course of treatment. He is not responsible for damages for want of success, unless it is shown to be the result of want of ordinary skill and learning, such as ordinarily possessed by others of his profession, or for want of ordinary care and attention. He is not presumed to engage for extraordinary skill and for extraordinary diligence or care, nor can he be made responsible in damages for errors in judgment, or mere mistake in matters of reasonable doubt or uncertainty."

In order for plaintiff to recover in this case, it is absolutely essential that two conditions be shown to exist: First, it must appear from the evidence that the plaintiff sustained and suffered legal detriment or damage; and, second, such detriment or damage may not be referable solely to the accident with which he met, but it must be shown on his part that considering the accident which he suffered and his employment of a physician, still he is left in a condition worse than was his right to demand and expect, if his physician was ordinarily skillful and gave him the proper care. In the case at bar plaintiff complains of two things as constituting his detriment or damage: First, that his fractured limb was from an inch to an inch and one-half shorter than it had been; second, that the fractured and injured part was still painful, and that it was necessary, in order to use it, to call to his assistance a crutch or cane. Of course, if plaintiff's limb within a proper time had been restored in the treatment secured to a perfect limb, as it was prior to the time when broken, he could not recover from the physician who treated him, notwithstanding lack of skill shown or negligent care bestowed. So, in our judgment, it would follow if in the consensus of opinion of men schooled and learned in the science of surgery, well acquainted with the facts controlling and surrounding, and results attending such an accident as this, the limb, after treatment, if no unnecessary pain was occasioned or time consumed, was in as good a condition as an ordinary skillful physician, using ordinary care, could in the usual and expected course of events produce, then the plaintiff has failed to show that he has suffered such damages or detriment as the law will compensate him for; for while it may not be physically and actually perfect, it is in that condition in which the limitations of human skill leaves a limb, fractured as it was.

This being true, the plaintiff has not suffered legal damage. He is not damaged. *Getchel v. Hill*, 21 Minn. 464; *Feeney v. Spalding*, 89 Me. 111, 35 Atl. 1027; *Stern v. Lang*, 106 La. 738, 31 So. Rep. 303; *Hesse v. Knippel*, Mich. N. P. (Brown) 109; *Tomer v. Aiken et al.*, 126 Iowa, 114, 101 N. W. 769; *Craig v. Chambers et ux.*, 17 Ohio St. 254; *Ewing et al. v. Goode*, (C. C.) 78 Fed. 442.

In the case last cited, *Ewing et al. v. Goode*, 78 Fed. 442, TAFT, Circuit Judge, said: "It is well settled that in such an employment the implied agreement of the physician or surgeon is that no injurious consequences shall result from want of proper skill, care, or diligence on his part in the execution of his employment. If there is no injury caused by lack of skill or care, then there is no breach of the physician's obligation, and there can be no recovery. *Craig v. Chambers*, 17 Ohio St. 253, 260. Mere lack of skill, or negligence, not causing injury, gives no right of action, and no right to recover even nominal damages. This was the exact point decided in the case just cited. In *Hancke v. Hooper*, 7 Carr. & P. 81, TINDAL, C. J., said: "A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice; but in an action against him the plaintiff must show that the injury was procured by such want of skill, and it is not to be inferred." Before the plaintiff can recover she must show by affirmative evidence: First, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, established neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, '*Res ipsa loquitur*,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon, causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

On this proposition the Supreme Court of Ohio, in the case of *Craig v. Chambers*, 17 Ohio St. 253, held, in the syllabus, that: "The implied liability of a surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious

consequences resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment. And in an action against the surgeon for malpractice, the plaintiff, if he shows no injury resulting from the negligence, or want of due skill in the defendant, will not be entitled to recover nominal damages."

Should it be shown, however, by the evidence, that the limb which plaintiff had was not such a limb as a physician of ordinary skill and using ordinary care and diligence should have left him with, after treating it, then the burden is upon plaintiff, in order to sustain the verdict in this case, to show by the evidence that this result was brought about through lack of skill on the part of the physician, or through some wrongful or negligent act of omission or commission on his part. Neither of these conditions should be supported merely by theory, conjecture, or inference, but they should be based upon tangible, substantial evidence which the court and jury may grasp and understand. A physician employed in a case such as this, it should be remembered, as was said by Justice UPRON (*Williams v. Poppleton*, 3 Ore. 139), "is obliged by his calling constantly to enter the abode of others, and frequently critical operations in the presence of those who are ignorant and credulous. He is liable to have his acts misjudged, his motives suspected and the truth colored or distorted even where there are no dishonest intentions on the part of his accusers. And, from the very nature of his duty, he is constantly liable to be called upon to perform the most critical operation in the presence of persons united in interest and sympathy by the ties of family, where he may be the only witness in his own behalf. It is the intention of the law to protect the physician or surgeon as well as the patient. * * * A fracture or dislocation, or both combined, may be so complicated that no human skill can restore it. Or the patient may, by disregarding the surgeon's directions, impair the effect of the best-conceived measure. The surgeon does not deal with inanimate or insensate matter, like the stone mason or bricklayer, who can choose his materials and adjust them according to mathematical lines; but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control. Where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences, such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful, and dangerous, and may have

greater influence in the result than all the surgeon may be able to accomplish, even with the best skill and care." This being true, he should not be condemned except the evidence requires and justifies it.

With these observations and the law before us, we now turn to the evidence upon which the plaintiff relies for recovery, and find that it shows briefly the following facts: About four months prior to the filing of his petition in this case, plaintiff, who was a man of the age of fifty-six years and of fairly good health and activity, fell on the ice and fractured the femur bone of his right leg at or near the neck. He called in the defendant to treat him, and defendant arrived in about two hours after the accident, placed the plaintiff under the influence of chloroform, and made an examination. Plaintiff and a number of other witnesses, members of his family and neighbors, testified that the defendant informed him and them that the limb was fractured at a place above the knee between it and the upper part of the femur, perhaps about the middle. It also appears that defendant applied what the physicians term a "Buck's extension," which consisted of, in this case, a splint in the shape of a board, attached to the limb on the under side, to which was fastened a rope which extended to a window frame, with a five and one-half pound iron attachment, for the purpose of tiring and extending the muscles to bring the broken part of the bone in opposition. This occurred on the 1st day of February, 1905, the doctor remained with the plaintiff all of that night, and on the morning of the second day thereafter he returned, bringing with him what is commonly known as a "Hodgin splint," and appliance which he had made, consisting of an iron rod, bent much in the shape of a hair-pin, the two sides laced together with webbing or cloth, and of about the length and shape of the leg. Into this the limb was placed, with the foot near the loop, the open end being towards the body, the inside being about ten inches shorter than the outside piece. This entire frame was then swung about two inches clear of the bed, allowing the limb to lie in this splint, which was attached to a pulley from the ceiling or window ledge by ropes or cords. That in this condition plaintiff remained in bed about three weeks, during which time he was waited upon by the physician. Plaintiff testified that his limb was left by this treatment in a weak, stiff condition in the hip, which interfered with its use, that it hurt him in walking, and he stated: "I cannot use it as well as I could before it was hurt, it is stiff, and the muscles won't expand;" also that he could not walk without the use of a cane or crutch. This is the proof of the

damage on which he relies to recover. On his examination by his counsel, being requested to stand in his natural position with his back to the jury, he stated that the reason he did not put his right heel to the floor, upon being requested to do so, was that he could not. On being asked how far his heel was from the floor, he stated it was about two inches, whereupon his counsel stated, "It may feel that way, but I guess it is about an inch." Plaintiff also stated that since the treatment by defendant he had applied to Messrs. Sharp and Stagner, local physicians, for treatment. Dr. Stagner, one of the physicians, called by plaintiff, testified that he made an examination of his limb at his own and at Dr. Sharp's office, and was present when the same was examined with the X-ray. That the examination revealed an impacted fracture at the neck of the femur, the result of which he stated necessarily shortened the limb. He further testified that in a case of this character it was very likely that treatment would not produce the best results, and that the limb would be shorter than its normal length. That some of the authorities claim this shortening to be inevitable, as the bones of old persons do not knit as well as those of young people, and that the union is more likely to be fibrous. That he would not regard eighty-one per cent. of bad results as being much too high a per cent. in cases of this character.

Dr. Sharp, the other expert called on behalf of plaintiff on this proposition, testified as follows: "Q. In treatment of fracture in the neck of the femur, how about shortening of the limb; is that a good result? A. In many cases it is. Q. Is it not a fact that there are eminent authorities who say that, in patients above fifty years of age, the shortening of the limb is inevitable? A. I think there are a number of authorities who make that statement." The foregoing presents substantially all the evidence given by the experts called on the part of plaintiff upon the question of the shortening of the limb. From them it appears that the injured limb was from one inch to one inch and one-half shorter than the other, and from this evidence no other inference can be drawn than this was as good a result as could be reasonably expected, considering the age and condition of the plaintiff. At all events, there is an absolute lack of any evidence showing that in cases of this character, under any kind of treatment, the limb is ever perfect afterwards or equals in length the uninjured limb. In this case the burden was not upon the defendant to show that plaintiff's limb was in as good a condition as medical science and skill could place it after its injury, but the burden was upon the plaintiff to show that it was not. This, in our

judgment, he totally failed to do. The defendant, however, voluntarily assumed the burden of showing that the results which were attained by the treatment were all that could have been expected under the conditions.

The plaintiff was able to get around on his limb by the use of a cane or a crutch. It was, as we have seen, from an inch to an inch and one-half shorter than the sound one. This condition was presented to a number of physicians called by the defendant, and they were interrogated upon the proposition as to whether or not such a result was practically all that medical science could promise. We note a few of their answers to this question.

The defendant himself testified: Q. Would there likely be a perfect recovery in a fracture of that kind, Doctor, under any kind of treatment that medical science could give it? A. In a man of Mr. Elder's age, the latest statistics say there are absolutely none that are perfect. Q. In what way would there be any imperfection? A. There would be a shortening of the limb, and consequently a lameness." He further stated that the statistics in cases of this character show that of young and old, taken together, eighty per cent., get a bad result.

Dr. Morse, who for eighteen months was shown to have been on the house staff of surgeons in the Cook County Hospital, in Chicago, after he had graduated, testified to having had many cases of this character, and deposed as follows: "A. It seems, so far as I know, it is an unknown thing in the profession to get a good result, and a good result is one in which there is no abnormal condition; it is practically never obtained in hip-bone fractures. Q. What are the ordinary results? A. I should say that, after a period of six months or within a year the ordinary case, if not too feeble, will get out with crutches first, and then with a cane, and then they will be fortunate if they can get along with or without a cane. Q. Are these the results that are expected and anticipated in the best hospitals? A. They are."

Dr. Morse further testified on this same subject, as follows: "A. Sometimes if they get a bony union and good apposition of the bones, particularly where they are strong, I mean where the patients are strong, they can get along with practically very little limp or without even a cane, but this is only in exceptional cases; the majority of them use the crutch or crutches for a period of months, and sometimes never get along without a crutch, and in some instances never get out of their wheel chair. Q. What about the shortening of the limb? A. The degree of shortening varies from

three-fourths of an inch to two inches, with more or less tenderness remaining all their lives. Q. Then inability to get about without the use of a crutch or cane, a permanent shortening of the limb and a decided halt in their gait the remainder of their days, these are some of the results of a fracture of this kind? A. Yes, sir; they are among the most common results."

Dr. Reed testified as follows: Q. Have you had information and known, Doctor, either by observation, experience, study, or reading, the liability of shortening of the limb by a break in the neck of the femur? A. I have. Q. What is the likelihood or probability of that? A. We always expect to get shortening. Q. Under the most approved and proper methods of treatment? A. Yes, sir. Q. In a person as old as the plaintiff here, what about soreness in the parts? A. There would probably be tenderness for a long time. Q. What do you mean by a long time, Doctor? A. Several years. Q. What about the ability to get around after an injury of that kind and at his age? A. The results are never perfect in a man of that kind and at his age; the period of getting about varies in different patients. I would consider, if he was even able to use the limb in walking by putting his weight on it, that it would be as good or better than the average result."

Dr. Hill testified: "Q. In fractures in the neck of the femur, what is the probability or likelihood of a shortening of the limb in a person as old as the plaintiff, here? A. It is practically inevitable, and it is expected in every case. Q. What about soreness, Doctor, and how long continued? A. That would depend upon the immobility of the joint, but ordinarily it would last a year or two; depends upon the amount of inflammation at the time of treatment."

Dr. Baker testified: "Q. In a person of this age, Doctor, and his apparent condition, what would you say as to the probability of a shortening of the limb? A. I would say there would be a very remote possibility of getting a result without shortening of the limb to some extent. Q. What about soreness in the parts, and what might you expect in that regard? A. He could expect trouble for the balance of his life in some way or other. If he didn't get union, he would have a limb that would be almost useless; if he got union, he might expect trouble in the way of soreness and things in that line, and the probability is he never would get entirely over it, so he would always have trouble. * * * Q. Why is it that there is such a large per cent of bad results in the treatment of a fracture of this character? A. Well, in the first place, it is on account of the location of the injury; it is impossible to get the broken parts

in apposition, and it is equally impossible to keep them there if you do get them; then a great many are mixed fractures, part intracapsular or extracapsular, difficult both of diagnosis and treatment; then in that location you may not get union at all on account of the intervention of muscles; the blood supply may be deficient, or a disease of the bone may develop and arrest the knitting process, especially in the aged; in fact, some physicians question the advisability of trying to get union at all under some conditions, because the patient will suffer less not to have union, although the leg may not be so useful; so it is the nature of the trouble and the location that causes so many bad results."

Dr. Melvin testified: "Q. Now, under the best treatment that is known to medical science, what do you say as to the probability of a shortening of the limb from a fracture of the femur? A. It is very probable; indeed, I do not believe there would be more than five or ten out of a hundred that would not have shortening. Q. Suppose the fracture is in the neck of the femur, is the liability to shortening greater or less? A. It is more apt to have shortening if it is in the neck. Q. Is it always possible to get a union of the bone with a person as old as the plaintiff? A. No, sir. Q. What about soreness in the parts; what might be expected in that regard? A. Well, a great deal would depend upon the amount of lymph thrown out and the callous formation; it would naturally press on the nerves and cause a great deal of pain that might last for a number of years."

Dr. Ralph Smith testified to practically the same effect as the other physicians, and the testimony of them all, as is seen, supports the theory that the plaintiff, considering his age and the character of the fracture, without reference to the character of treatment given him by his attending physician, had as good a limb as he had a right to expect or demand, and, in the absence of evidence showing that an ordinary skilled physician, exercising ordinary diligence in his treatment, would or should have produced a different and a better result, then plaintiff cannot be said to be damaged or to be entitled to recover. There is no contention made on the part of plaintiff that defendant was not possessed of skill sufficient to entitle him to hold himself out and to treat cases of this character, unless this claim could be predicated upon the contention of plaintiff that defendant made an erroneous diagnosis, and that the adoption of the splint heretofore mentioned and the manner of its use was an indication of such a want of skill. The conclusion to which we have come relieves us of the necessity of minutely detailing the evidence bearing upon this question, for reasons we have heretofore stated,

but we will say that there was no physician called on either side who, when asked, did not testify that the Hodgkin splint was such an apparatus as was recognized by the profession as standard and was used generally for cases of this character, whether for a break in the shaft, or in the neck of the femur, while many of the physicians testified that this splint was considered as one of the best apparatuses of its character known to the profession and was in use in the best hospitals. The defendant testified that the limb of plaintiff was attached to this frame, and that the extension was such that it was necessary to raise the foot off the bed in which plaintiff lay in order to relieve him of being pulled down into the bed by the force of the same. Plaintiff testified that his limb was not attached to the apparatus, or that, if it was, the attachment was removed, and that by reason of this his limb came out of the splint, and that it was necessary to replace it on occasions. Some of the physicians testified that it was a matter of judgment as to whether or not it was necessary to attach the limb to the splint, and as to whether or not, without being attached, there would be sufficient extension to overcome the contraction of the muscles; but the general net result, and only rational conclusion to be drawn from the testimony of all of the physicians is that plaintiff received treatment such as was recognized to be proper and that the result was practically all that could be looked for.

There is no other higher or better method known to our law or practice to determine disputed questions of fact than by the verdict of twelve jurors. Where a cause of action is shown to exist, and they are permitted to hear all the relevant, competent, and material evidence offered, and the instructions of the court are proper, a verdict reasonably supported by such evidence is not to be lightly regarded or set aside by an appellate tribunal. These observations are fundamental, but there are no classes of cases, perhaps, which go to juries, or, indeed, with which lawyers and courts are called upon to deal, where results are so uncertain and so frequently unsatisfactory as cases involving damages against the physicians for alleged malpractice in their efforts to alleviate the ills to which the human flesh is heir. It is nearly always the defendant's judgment which is on trial; and on the hearing the jury and the parties are all sitting and speaking after the fact, while the unfortunate physician when he acted was perhaps required by the conditions to grope, deliberate, and often speedily act, and always before the fact. After he has acted and the results are different than he desired or expected, and different than were expected or desired by the patient, if a suit is

brought, the physician is confronted with all of the after-acquired knowledge, and his responsibility is weighed from that standpoint rather than from the true one. A preponderance of the evidence in cases of this character is sufficient to sustain the plaintiff's cause. No more should be required, and no more is required; but it should be certain on the part of the court and jury that they are acting from evidence before them properly referable to the cause, and that the judgment, when against the physician, is based upon such evidence, and not upon bias, conjecture or inference.

In keeping with these general observations, attention is called to the language used by Chief Justice Thayer in the case of *Langford v. Jones*, 18 Ore. 307-323, 22 Pac. 1064, 1070: "The practice of leaving the jury to determine such cases has been permitted often, when the responsibility was really upon the court. It is wrong and unjust to the medical profession to pursue such a course; it tends to encourage the institution of suits against its members when no grounds exist therefor. A physician, in the treatment of disease, or in the performance of surgical operations, does not always achieve that success he desires. Circumstances often intervene over which he has no control, and render his treatment unsatisfactory. This is more especially so with surgery. It frequently happens in the reduction of a fracture or dislocation that from some cause, for which the surgeon was in no wise responsible, the parts of the broken bone have not properly united, have been found not to be in perfect apposition, or the dislocated joint to be enlarged, or that muscular action of the limb has become suspended, or the limb become crooked; and sometimes in consequence of important nerves having been severed at the time of the fracture, a loss of sensation of the parts is occasioned, resulting in a permanent numbness, and amputation becomes necessary. In a majority of such cases the party injured by the casualty will claim damages against the surgeon who attended upon him, and have no difficulty in having an action instituted to enforce it, predicated his cause upon alleged negligence in the reduction of the fracture or dislocation, or of insufficient support to the broken parts, or of too tight bandaging, or upon some other pretext, but relying mainly upon the deformity of the limb as the ground for a recovery; and generally, through the sympathy, prejudice, or stupidity of a jury, succeed in mulcting the defendant in damages. * * * The average juror knows very little about such matters. If he has sufficient discretion to understand them in the outset, he will lose it by the time he has heard the expert testimony and the summing up of the counsel. A trial court should

never allow a case of malpractice to be submitted to a jury unless the plaintiff has fairly shown, by competent proof, that the defendant is guilty of the charge alleged against him."

In the concluding remarks of the court in that case, it said: "The judgment appealed from will be reversed. Ordinarily such a disposition of a case is followed by an order remanding it to the court below for a new trial; but under the peculiar circumstances existing in this case, such order will not be made. It will be remanded, however, with directions to dismiss the complaint.

In the case of *Ewing et al. v. Goode*, 78 Fed. 442, Judge Taft said: "The condition of the plaintiff cannot but awaken the sympathy of every one, but I must hold that there is no evidence before the court legally sufficient to support a verdict in her favor. I should deem it my duty without hesitation to set aside a verdict for the plaintiff in this case as often as it could be rendered, and, that being true, it becomes my duty to direct a verdict for the defendant."

In the case at bar, with all of the evidence before us on which plaintiff could possibly predicate the hope of recovery, and there being a total want and absence of the necessary elements to entitle him to recover, the cause is accordingly remanded to the county court of Logan county with instructions to dismiss the same.

KANE, CH. J., and TURNER, WILLIAMS and HAYES, JJ., concur.

LYTTLE v. DENNY.

Supreme Court, Pennsylvania, January, 1909.

INNKEEPER — DUTY TOWARDS GUEST. — The duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger.

NEGLIGENCE — BURDEN OF PROOF. — "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." [Rule in *Scott v. London, etc., Docks Co.*, 3 Hurl. & C. 596, applied and stated in *Delahunt v. United Tel. & T. Co.*, 215 Pa. St. 241, 20 AM. NEG. REP. 727, 64 Atl. 515.]

INNKEEPER — GUEST INJURED BY FOLDING BED IN HOTEL — NEGLIGENCE — BURDEN OF PROOF. — Plaintiff, a guest in defendant's hotel, was assigned to a room in which was an old style folding bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in

use. The top of the bed weighed about 300 pounds. Plaintiff occupied the bed during the night, and next morning when about to rise the top or upright portion of the bed fell forward upon him, inflicting severe injuries. On trial of action for damages plaintiff was nonsuited. On appeal it was *held* that the burden was upon the defendant to show that the accident happened from no want of care on his part, and judgment was reversed (1).

1. Liability of innkeepers for injuries to guests.—Among the cases reported in AMERICAN NEGLIGENCE REPORTS, see the following:

Rahmel v. Lehdorff, (Cal. 1904) 16 AM. NEG. REP. 7, 142 Cal. 681; *Harter v. Colfax Elect. L. & P. Co.*, (Iowa, 1904) 16 AM. NEG. REP. 446, 124 Iowa, 500; *Lyons v. Dee*, (Minn. 1903) 13 AM. NEG. REP. 543, 88 Minn. 490; *Clancy v. Barker*, (Neb. 1904) 15 AM. NEG. REP. 594, 98 N. W. 440; also (1905) 18 AM. NEG. REP. 173, 103 N. W. 446; also same case in U. S. C. C. A. 1904, reported in 16 AM. NEG. REP. 664, 131 Fed. 161; *Armindo v. Ferguson*, (N. Y. 1899) 5 AM. NEG. REP. 419, 37 App. Div. 160; *Weeks v. McNulty*, (Tenn. 1898) 5 AM. NEG. REP. 419, 101 Tenn. 495; *Texas Loan Agency v. Fleming*, (Tex. 1899) 6 AM. NEG. REP. 214, 92 Tex. 458, reversing 46 S. W. 63; *Bremer v. Fleiss*, (Wis. 1904) 16 AM. NEG. REP. 275, 121 Wis. 61; *Jefferson Hotel Co. v. Warren*, (U. S. C. C. A., N. Y. 1904) 15 AM. NEG. REP. 759, 128 Fed. 565.

Liability of innkeeper for loss of guests' property and personal effects.—See numerous cases reported in Vols. 1-20 AM. NEG. REP., collated under the title of INNKEEPER in the AMERICAN NEGLIGENCE DIGEST (1909).

See also *Rockhill v. Congress Hotel Co.*, (Ill.) 86 N. E. 740, in this volume of AM. NEG. REP., pages 90 to 97, *ante*; together with notes of cases thereto.

Among recent cases of injuries to guests see the following:

Refusal to furnish accommodations.—In *HERVEY ET AL. v. HART*, (Alabama, December, 1906) 42 So. Rep. 1013, appeal by defendants from order granting plaintiff a new trial in an action in the Circuit Court, Mobile county, for damages for refusing to furnish plaintiff with accommodations in defendant's hotel, order granting a new trial was affirmed. The opinion was rendered by HARALSON, J., who ruled (as per the syllabus to the report in 42 So. Rep.):

"Under the common law, by which, under Code 1896, sec. 2539, in the absence of a special contract, the liability of an innkeeper to his guests is measured, while an innkeeper may change the apartment of a guest and assign him to another proper apartment, he may not put him out of the apartment assigned him and refuse him other proper accommodations."

Bottle thrown from roof garden of hotel and injuring person in street.

—In *BRUNER v. SEELBACH HOTEL CO., ET AL.*, (Kentucky, March, 1909) 117 S. W. 373, judgment for defendants in the Circuit Court, Jefferson county, Common Pleas Branch, Third Division, in an action by plaintiff for injuries sustained, while standing on street, by being struck by a bottle that was thrown from the roof garden of defendant's hotel by a guest, was *affirmed*. Opinion by CLAY, C., in the course of which he said (on the question of defendant's knowledge of the conduct of a guest):

"The fact must be remembered

APPEAL from Court of Common Pleas, Cambria County, in an action by A. C. Lyttle against J. B. Denny. From an order refusing to take off a nonsuit, plaintiff appeals. The facts appear in the opinion. *Judgment reversed.*

ARGUED before MITCHELL, CH. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

that ordinarily innkeepers have no control over their guests. It is only when they know, or by the exercise of ordinary care could know, that the guest's conduct is such that injury will naturally result to others, that they have the right to eject the guest, or take precautions to control his conduct. There being no evidence tending to show that the roof garden was a nuisance, and nothing in Wolfe's previous conduct from which the hotel company or its agents might have known that he would injure some one walking on the street, it was not error to confine the inquiry of the jury to the question whether or not the hotel company or its agents knew, or by the exercise of ordinary care could have known, that Wolfe's manner and behavior were such as to indicate to a man of average prudence operating the roof garden that Wolfe might throw a bottle or other missile from the garden into the street below."

Ejecting persons from hotel.—In HOLDEN v. CARRAHER ET AL., and HUDDY v. CARRAHER ET AL., (*Massachusetts*, May, 1907) 81 N. E. 261, defendant's exceptions to judgment in favor of plaintiff in the Superior Court, Suffolk county, in action for damages for ejection from defendant's hotel for alleged disorderly conduct while a guest at said hotel, were sustained, an instruction that seemed to imply that even if defendant had the right to order plaintiff out of the hotel, he could not proceed to expel him unless he was still acting in a disorderly manner, being

prejudicial error. Opinion by HAMMOND, J.

Injured in hotel elevator.—In McCracken v. MEYERS, (*New Jersey Errors and Appeals*, March, 1908) 68 Atl. 806, judgment for plaintiff in the Circuit Court, Atlantic county, in action for damages for injuries sustained while riding in a passenger elevator in defendant's hotel, was affirmed. Opinion by DILL, J. The syllabus by the court is as follows:

"It is the duty of the proprietor of a hotel operating a passenger elevator therein to exercise at least ordinary care in the character of the appliance provided and in its maintenance and operation. This duty he owes to every person who has lawful business on the premises, and who has occasion to use the elevator for transportation from floor to floor, whether such person be guest, visitor, or otherwise."

Fire in hotel—Absence of fire escapes.—In YALL v. SNOW ET AL., (*Missouri Supreme Division 2*, December, 1906) 100 S. W. 1, appeal from judgment for defendants in the St. Louis Circuit Court in action for damages for death of plaintiff's husband caused by the burning of a building owned by defendants and used as a hotel, judgment was reversed. It was held that an allegation that the building was leased "as a hotel" and conducted as such by the tenants to defendant's knowledge, sufficiently alleged the character of the building to bring it within the statute requiring owners of hotels to provide fire escapes. Act March 27,

THOMAS H. GREEVY, J. C. DAVIES, and E. G. BROTHERLIN, for appellant.

M. D. KITTELL and H. H. MYERS, for appellee.

POTTER, J. — From the history of this case it appears that in May, 1903, the plaintiff was a guest at the hotel of the defendant in Johnstown, Pa. In the room which was assigned to him there was

1901 (Laws 1901, p. 219, sec. 1; Annot. Stat. 1906, p. 4181). Opinion by GANTT, J.

Fire—Absence of fire escapes.—In ADAMS v. CUMBERLAND INN COMPANY, (Tennessee, April, 1907) 101 S. W. 428, judgment for defendant in the Circuit Court, Campbell county, in action for injuries sustained by plaintiff jumping from hotel window to street to escape danger from fire, was reversed. It was held that it was a question for jury whether failure to provide fire escapes at the hotel was the proximate cause of the injuries. The negligence relied upon to sustain the action is the failure of the Cumberland Inn Company to furnish and equip the hotel with fire escapes, ropes, and ladders as provided for by sections 1, 2, and 9, of an Act passed by the General Assembly on March 18, 1899 (chapter 178, p. 352, Acts 1899), and an ordinance of the city of La Follette in force at the time of the fire. It was held that the statute did not apply to a hotel built in 1898, but a city ordinance imposing such duty of placing fire escapes on hotels did apply, and was a reasonable police regulation. Opinion by SHIELDS, J.

Guest humiliated by hotel servant forcing himself into room.—In DE WOLF v. FORD ET AL., (New York Appeals, November, 1908) 86 N. E. 527, appeal from judgment of the Supreme Court, Appellate Division, First Department (119 App. Div. 808, 104 N. Y. Supp. 876) affirming judgment of Trial Term dismissing complaint, judgment was reversed and

new trial granted. The facts, as stated in the opinion by WERNER, J., were as follows:

"This action was brought to recover damages which the plaintiff claims to have sustained through the acts of the defendants' servant, who is charged with forcing his way into a room occupied by the plaintiff in defendants' hotel, and addressing to her insulting, derogatory, and defamatory language. The action was brought to trial before the court and a jury. At the opening of the trial the defendants' counsel moved to dismiss the complaint upon the pleadings. This motion was granted, and judgment entered dismissing the complaint. Upon appeal to the Appellate Division the judgment was affirmed by a divided court, and an appeal has been taken to this court. The sole question to be determined here is whether, upon the facts stated in the complaint and supplemented by the allegations of the defendants' answer, the case should have been submitted to the jury. The complaint alleges that on June 5, 1905, the defendants managed and controlled the Grand Union Hotel in the city of New York, which was a public inn for the entertainment of guests for hire; that the plaintiff, in company with her daughter and her brother, called at that hotel and applied for rooms, giving their true and proper names and stating the relationship of each to the other; that the plaintiff and her brother and daughter were thereupon received as guests of the hotel, and the plaintiff

an old-style folding bed, with a wardrobe in the back, and so arranged that the bed portion would fold up so as to leave the bed in an upright position when not in use. The top of the bed was heavy, weighing about 300 pounds. The plaintiff occupied the bed during the night, and early the next morning, as he was about to rise, the top or upright portion of the bed fell forward upon him, crushing

was assigned to a room therein; that thereafter, and at about one o'clock in the morning of the next day, while the plaintiff was occupying the room so assigned to her, one of the servants of the defendants, in the course of his regular employment in the hotel, forced his way into the room of the plaintiff, without her consent and against her protest, she being then undressed, except in a nightgown, and addressed to her and in her presence, and in the presence of her brother and another person, vile and insulting language, charged her with being a disreputable person, accused her of conduct imputing guilt of impropriety and immorality, and insulted her in other ways; that the plaintiff was ordered to leave the hotel, and threatened with the publication of her name in the daily papers as a disreputable person; and that these acts committed by the said defendants' servant were in violation of the defendants' obligations toward this plaintiff as their guest. In their answer the defendants admit their management and control of the hotel, and that the plaintiff was assigned to a room therein on the day mentioned in the complaint. All the other allegations of the complaint are denied. Additional facts are set forth as a separate defense, and new matter is alleged by way of justification. The substance of this separate defense and of this new matter is that the defendants had established and enforced in their hotel a rule forbidding the presence of a man in a woman's bedroom, especially at

night, unless the room was occupied by husband and wife; that such a rule was reasonable and necessary for the maintenance of the good repute of the hotel, and for the protection of its guests against improper persons; that the plaintiff had violated this rule by permitting a man to enter and remain in her bedroom at a late hour of the night while she was clad only in a nightdress; that the defendants' servant informed plaintiff of the rule referred to, and requested her male visitor to leave the room, or to leave the hotel, and that this request was refused; that the acts of the defendants' servant complained of were simply such as were necessary to enforce this rule, and that no more was done than was reasonably necessary to accomplish that object."

After stating the rules governing the relation of innkeeper and guest, the court said:

"It is clear that the defendants were guilty of a most flagrant breach of duty towards the plaintiff. As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency. Had such an emergency arisen calling for immediate and unpremeditated action, on the part of the defendants or their servants, in conserving the safety or protection

his head down upon his breast and inflicting severe injury. To recover damages for the injury thus caused the plaintiff brought this suit against the proprietor of the hotel. Upon the trial at the conclusion of plaintiff's testimony, the court entered judgment of compulsory nonsuit, and from the refusal to strike it off the plaintiff has appealed.

The main question raised is as to the liability of an innkeeper to his guests. We find the general rule of law in this respect is thus

of the plaintiff or of other guests, or of the building in which they were housed, the usual rules of decency, propriety, convenience, or comfort might have been disregarded without subjecting the defendants to liability for mistake of judgment or delinquency in conduct; but, for all other purposes, their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was, for the time being, her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper. Instead of acting according to these simple rules, the servant of the defendants forced his way into the plaintiff's room, under conditions which would have caused any woman, except the most shameless harlot, a degree of humiliation and suffering that only a pure and modest woman can properly describe. Not content with that, the servant castigated the plaintiff with opprobrious and offensive epithets, imputing to her immorality and unchastity, and, as a fitting climax to such an episode, ordered the plaintiff to leave the inn." * * *

"The measure of liability, if any, will be purely compensatory, and not punitive; the plaintiff's right to re-

cover being confined to such injury to her feelings and such personal humiliation as she may have suffered. *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 70 N. E. 857, 16 AM. NEG. REP. 181. That is the extent to which the defendants' liability may fairly be said to spring from their breach of duty. Any remedy beyond that which the plaintiff may seek to assert must be invoked in a different form of action. The gravamen of the action at bar is not the alleged slanderous defamation of the plaintiff, but the defendants' breach of the duty which it owed to the plaintiff and the injury which was directly caused thereby."

2. See *Clancy v. Barker* (U. S. C. C. A., Eighth Circuit, May, 1904), reported in 16 AM. NEG. REP. 664-681, in which the question of liability of innkeepers for injuries to guests is fully discussed in the opinion rendered by SANBORN, Circuit Judge, and in the dissenting opinion rendered by THAYER, Circuit Judge.

See also the same case in the Nebraska Supreme Court, decided in 1904 and reported in 15 AM. NEG. REP. 594, 98 N. W. 440, where a different conclusion was reached than that in the United States Circuit Court of Appeals upon the same state of facts.

See also a subsequent decision in the same case rendered in the Nebraska Supreme Court in 1905, and reported in 18 AM. NEG. REP. 173, 103 N. W. 446.

stated in Beale on Innkeepers and Hotels, § 162, 163: "The innkeeper is bound to provide reasonably safe premises. * * * Both in original safety of construction and in maintenance the premises must be such as reasonably to secure the safety of the guest. So the innkeeper has been held liable for injury to the guest by the ceiling falling upon him, owing to its defective conditions; by the elevator falling with him, after having been negligently inspected, although the innkeeper himself had employed a proper inspector, and was not personally negligent; by the breaking of a defective railing, by reason of which the guest fell into an area; and by the guest falling off an unguarded stairway." The authorities are in substantial agreement that while the duty of an innkeeper requires him to take reasonable care of the persons of his guests, he is not to be regarded as an insurer of their safety. His liability has sometimes been declared to be similar to that of a common carrier, but the better opinion seems to be that the degree of care required of an innkeeper is not so great as that which is imposed upon those who carry passengers for hire. In discussing this question in *Clancy v. Barker*, 131 Fed. 161, 16 Am. Neg. Rep. 664, 66 C. C. A. 469 (2), Judge Sanborn says: "While there are many loose statements in the books to the effect that the liability of common carriers to their passengers and the liability of innkeepers to their guests are similar, and while that proposition may be conceded, it is certain that the limits of these liabilities are by no means the same. A railroad company is liable to its passengers for a failure to exercise the utmost care in the preparation of its road and the operation of its engines and trains upon it, because the swift movement of its passenger trains is always fraught with extraordinary danger, which it requires extraordinary care to avert. But an innkeeper's liability for the condition and operation of his hotel is limited to the failure to exercise ordinary care, because his is an ordinary occupation, fraught with no extraordinary danger." It may be assumed, then, that the duty imposed by law upon an innkeeper requires him to furnish safe premises to his guests, and to provide necessary articles of furniture, which may be used by them in the ordinary and reasonable way without danger. Did the defendant, then, in this case, use such reasonable care in the discharge of his duty to the plaintiff who was his guest? The testimony introduced showed the fact and manner of the accident, but stopped short of pointing out the exact defect in the bed which caused it to fall down upon and entrap the plaintiff. The trial judge thought it was incumbent upon the plaintiff to show in detail just what was

wrong with the bed, and the reason for its falling; and because this did not appear from the testimony offered by the plaintiff, judgment of nonsuit was entered. We do not agree with his view in this respect. Bearing in mind the duty of the innkeeper to guard with reasonable care the safety of his guests, proof of the happening of such an extraordinary accident casts the burden of explanation at once upon the defendant. The accident was so far out of the usual course that no fair inference can arise that it could have resulted from anything less than negligence upon the part of the management of the hotel. Beds do not usually operate as spring traps to close upon and catch the confiding guest. Yet the bed furnished by the defendant to the plaintiff in this case proved to be just such a dangerous trap. Without any apparent cause the heavy head fell forward and down over the plaintiff while he was quietly lying upon the bed, and injured him severely. This could not have occurred had the bed been in proper condition for use. We think the facts bring the case within the rule laid down in *Scott v. London, etc., Docks Co.*, 3 Hurl. & C. 596, and often applied by this court, as in *Delahunt v. United Tel. & T. Co.* 215 Pa. St. 214, 20 Am. Neg. Rep. 727, 64 Atl. 515, where the principle is stated as follows (page 248 of 215 Pa. St., page 731 of 20 Am. Neg. Rep., page 517 of 64 Atl.) "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The circumstances under which this accident occurred were certainly such as to call for full explanation by the defendant. The facts indicate a lack of reasonable care upon his part, and it is for him to show why he should be relieved from liability.

Counsel for appellant also complain of the exclusion of certain depositions which were offered in evidence. But it appears that no rule of the lower court authorized the taking of the depositions of the witnesses in question, and they were therefore properly excluded. The rules of the Cambria county court provide for taking the depositions of ancient, infirm, and going witnesses, but it was not shown that these witnesses were within this classification, or that their presence in court might not be obtained.

The first, second, and third assignments are overruled, but as we deem the facts shown sufficient to take the case to the jury upon the question of the defendant's negligence, the fourth assignment of error is sustained, and the judgment is reversed with a *procedendo*.

JOHNSTON V. MACK MANUFACTURING COMPANY.

Supreme Court of Appeals, West Virginia, April, 1909.

1. **ANIMALS—ATTACK BY A BOAR—LIABILITY OF OWNER FOR PERSONAL INJURIES.**—The owner and keeper of a boar is not liable for a personal injury inflicted by him, unless it appear that he was vicious, and that such owner and keeper had previous knowledge of his vicious propensity, or unless the injury was done while trespassing upon lands inclosed by a lawful fence (1).
2. **EVIDENCE—EXPERT TESTIMONY—VICIOUS PROPENSITY OF ANIMALS.**—The habits and propensities of domestic animals are matters of common knowledge to all men, and expert testimony to prove the vicious propensities of a particular kind of animals in general, after they become a certain age, is inadmissible for the purpose of proving that the owner of an animal of that class had knowledge of his vicious propensity.
3. **ANIMALS — RUNNING AT LARGE — STATUTORY REGULATIONS.**—So much of section 2730, Code 1906, as relates to the running at large of bulls, buck, sheep, and boars, is the law only in those counties wherein it has been adopted by a vote of the people taken in the manner provided by section 2733 of the Code.

(Syllabus by the Court.)

1. For actions arising out of Injuries to Persons by Animals, and for Injuries to Animals by Animals, see vol. 1 AMERICAN NEGLIGENCE CASES, where the cases on these topics decided in the courts of last resort in all the States and Territories and in the Federal and Supreme Courts of the United States, from the earliest period to 1895, are classified and grouped in alphabetical order of States, and where notes of numerous English cases are appended.

For subsequent actions relating to Injuries by or to Animals, see vols 1-20 AMERICAN NEGLIGENCE REPORTS (from 1897 to 1907), and also this (vol. 21) and subsequent volumes of AMERICAN NEGLIGENCE REPORTS.

For a review of "Animal Cases" see the title of "Animals" in the new edition (1909) of the AMERICAN

NEGLECT, DIGEST, which covers vols. 1-20 AM. NEG. REP. (1897-1907).

See also the old edition of the AMERICAN NEGLIGENCE DIGEST of 1902 which classifies all the "Animal Cases" reported in vol. 1 AM. NEG. CAS.

See also the following notes of recent "Animal cases:"

Caretaker bitten by a camel — Owner liable. — In *GOODING v. CHUTES COMPANY (California Supreme. June, 1909)*, 102 Pac. 819, appeal from judgment in the Superior Court, city and county of San Francisco, in an action for injuries inflicted by the bite of a camel, judgment for plaintiff was affirmed. SHAW, J., stated the facts as follows:

"This is an action for damages caused by the bite of a camel. The defendant was keeping animals for

ERROR from Circuit Court, Hancock County.

ACTION by George H. Johnson against the Mack Manufacturing Company. From judgment for plaintiff, defendant brings error. The facts are stated in the opinion. *Reversed and remanded.*

E. A. HART, J. A. MCKENZIE, J. R. DONEHOO, and O. S. MARSHALL, for plaintiff in error.

G. L. HAMBRICK and ALFRED MARLAND, for defendant in error.

exhibition at a place called "The Chutes." The place in which the animals were on exhibition was commonly called the "Zoo." Among these animals was a camel. Plaintiff was employed by the defendant to look after, care for, and attend to the animals in the Zoo, including the camel. Upon entering the camel's stall to clean it, the camel seized the plaintiff's leg with his teeth, lifted him from the ground and swung him about in the air, biting his leg so severely that the bones were crushed, rendering amputation necessary." * * *

The court said that there was evidence of the vicious disposition of the camel and knowledge by defendant's superintendent.

"The Chutes" had several departments, each presenting different performances or means for the amusement and entertainment of the public, all within one general inclosure. The Zoo constituted one of these departments. The place was under the general charge of a general manager named Levy. The Zoo was under the special supervision of a superintendent named Lawrence. Several men were employed about the Zoo whose duty it was to sweep out the place daily, clean the cages and stalls every morning, and throughout the day when necessary, feed and otherwise care for the animals, watch the animals and visitors, and take care that the animals were not teased by the visitors and that the visitors were not injured by the

animals. These men were divided into two shifts for two different parts of the work, one of which included the care of the camel and its stall and the other did not, and they were changed from one shift to the other every week. The plaintiff was one of the men employed in this work. He was not assigned to the shift which included the care of the camel, until the day he was injured, one week after he began the service. The contract of employment was made with Lawrence, the superintendent of the Zoo. It does not appear from the evidence who directed him to go upon the shift to take care of the camel. He had at that time acquired by his own observation knowledge of the fact that when upon the new shift it was his duty to clean the camel's stall, and he entered the stall for that purpose without being specially directed to do so, and was immediately bitten as alleged. The evidence shows, without conflict, that two of these fellow-employees of the plaintiff knew of the vicious disposition of the camel at the time plaintiff was hired. As to the knowledge thereof by Lawrence, the superintendent who hired him, the evidence was conflicting.

"The court gave the following instruction: '2. If you believe from the evidence that the care of the animals in defendant's Zoo was intrusted to employees of the defendant, and that said employees were notified and knew that the camel in question had vicious propensities, the

WILLIAMS, J. — This is an action of trespass on the case for personal injuries inflicted upon plaintiff by a large boar, the property of defendant. Plaintiff and defendant owned adjoining lands in Hancock county, and defendant was the keeper and owner of a number of hogs, among them a large boar of the Berkshire breed, about five or six years old and weighing from 300 to 500 pounds. There was no lawful fence dividing their lands, and on the sixteenth day of April, 1906, this boar strayed onto the lands of plaintiff, and

defendant had notice and knowledge of such vicious propensities of said camel.'

"In view of the facts above stated, the jury would naturally understand this instruction to refer to the subordinate employees aforesaid engaged about the Zoo in the actual work above described. With respect to knowledge imputed to the owner of a domesticated animal of the fact that such animal is of vicious habits or disposition, the law is that, if knowledge of such fact is brought home to an agent or servant employed about the animal, and whose duty, as such agent or servant, requires him, if he knows of the vicious character of the animal, to act in respect thereof toward third persons, or toward the animal for the protection of third persons, in any matter involving a breach of such duty such knowledge of the servant is imputed to the master, although not imparted to him. *Clowdis v. Fresno Flume & I. Co.*, 118 Cal. 315, 3 AM. NEG. REP. 326, 50 Pac. 373; *McGarry v. N. Y. & H. R. Co.*, (Super. Ct.) 18 N. Y. Supp. 196, 1 AM. NEG. CAS. 327, affirmed in Court of Appeals, 137 N. Y. 627, 33 N. E. 745; *Brice v. Bauer*, 108 N. Y. 430, 1 AM. NEG. CAS. 184, 15 N. E. 695; *Brown v. Green*, 1 Pennewill (Del.) 535, 42 Atl. 991; *Niland v. Geer*, 46 App. Div. 194, 61 N. Y. Supp. 696; *Keenan v. Gutta P. Mfg. Co.*, 46 Hun. 546, 1 AM. NEG. CAS. 207; *Corliss v. Smith*, 53 Vt. 532, 1 AM. NEG. CAS. 252; *Har-*

ris v. Fisher, 115 N. C. 318, 20 S. E. 461; *Hammond v. Johnson*, 38 Neb. 248, 56 N. W. 967; *Applebee v. Percy*, L. R. 9 C. P. 647; *Lynch v. Kineth*, 36 Wash. 371, 78 Pac. 923.

"It was part of the duty of these employees, while occupied about the Zoo, to know whether or not the animals, or any of them, were dangerous to persons about them, and to take care that no person within the inclosure should be injured by such animals. For that purpose, they each represented the Chute Company, and were discharging that part of the duty of the Chute Company toward persons allowed to enter the Zoo. For a failure to discharge that duty by such employees, the principal would, of course, be responsible, and if one of these employees, knowing the vicious propensity of the camel, carelessly suffered a person to go near enough to the camel to be bitten by it, and such person was so bitten, the defendant would be liable for the damages thereby caused." * * *

Rehearing denied, July 14, 1909.

Person bitten by dog — Excessive damages. — *PULS v. POWELSON*, (Iowa, May, 1909) 121 N. W. 1, was an action for damages for personal injuries, resulting to plaintiff from the bite of a dog owned by the defendants. The petition prayed for a judgment for \$200 as expense and medical care, and \$1,000 for pain and suffering. At the close of the evidence the court withdrew the item of \$200 for medical care. There was a verdict

was endeavoring to break through plaintiff's inside inclosure to get to plaintiff's hogs. Plaintiff was engaged at the time in repairing the roof of his springhouse nearby, and did not see the hog at first. His daughter, who happened to be nearby, called his attention to the hog and plaintiff got down from the building, dropped the hatchet with which he had been working, and went to the hog to drive it away, whereupon it savagely attacked him, throwing him down, lacerating both legs badly, and causing a compound fracture

for the plaintiff for \$1,000. The trial court (District Court Kossuth county) required the plaintiff to remit one-third of the verdict or submit to a new trial. Plaintiff electing to remit, judgment was entered in her favor for \$666.66. Defendants appealed.

The opinion was rendered by EVANS, Ch. J., as follows:

"At the time of the injuries complained of the plaintiff was sixteen years of age, and lived with her parents one mile north of Wesley. The defendants lived on the same north and south highway with the plaintiff, and one-quarter of a mile south of her home. On New Year's day, 1907, while the plaintiff was walking in the highway in the direction of her home, in company with her sister and brother, and while passing the house of defendants, a dog came from the premises and attacked the plaintiff by biting her arm. The attack was brief, the dog running away as soon as it was done. The plaintiff suffered a wound which penetrated the skin on one side, and which became infected to some extent. It caused her much pain, and disabled her from doing any work for about one week. There was a complete recovery within about two weeks. This is presenting the case in accord with plaintiff's testimony. Under the testimony in plaintiff's behalf she was entitled to substantial damages, but not to large damages. The action was brought under the

statute. The statute creates an absolute liability on the part of the owner of a dog for damages done by him, regardless of knowledge or negligence on the part of the owner. In this respect the statute may be said to be drastic, though in the interest of public policy. The damages contemplated by it, however, are compensatory only. In this case no expenses were involved, nor loss of time, nor exemplary damages. The element of temporary pain and suffering furnishes the only basis for damages claimed. The jury allowed \$1,000, being the full amount claimed in the petition. The amount was manifestly excessive. The trial court reduced it to \$666.66, which the plaintiff elected to take. We cannot avoid the conviction that even the reduced verdict was still grossly excessive, nor can we avoid the conclusion that the verdict must have been given under the influence of passion and prejudice. There are some matters appearing in the record which doubtless account for the excessive verdict, but it will serve no useful purpose for us to discuss them.

"In view of the fact that the case has been twice tried, and that the right of the plaintiff to recover in some amount is very strongly supported by the evidence, the majority of this court are of the opinion that a new trial ought not to be peremptorily ordered on this record without giving plaintiff a right of election to take a reduced amount. It is also

of the large bone of one leg just above the ankle, and altogether injured him so badly that he was confined to his bed for a period of about six weeks. On the nineteenth of April, 1907, a trial was had resulting in a verdict for plaintiff for \$3,660.33. Defendant moved to set the verdict aside and grant it a new trial. The court took time to consider the motion, and, after due consideration, on the twenty-sixth of August, 1907, overruled the motion and rendered judgment on the verdict. Defendant presented several bills of ex-

the conclusion of the majority that such amount ought to be fixed at \$300. Plaintiff may have her election to take judgment for \$300, with interest thereon from the date of the verdict, or submit to a new trial. She may file her election within sixty days after the final disposition of the case in this court. If she file an election to take the amount named, the judgment below will be modified and affirmed accordingly. If she fails to file such election, it is ordered that the judgment below be reversed, and the case remanded for a new trial."

Injuries from dog bite — Evidence.

— In *BURNS v. BRIER*, (*Massachusetts*, January, 1910) 90 N. E. 399, defendant's exceptions to verdict for plaintiff in the Superior Court, Bristol county, in an action for damages resulting from a dog bite, were *overruled*. The exceptions related entirely to matters of evidence. Plaintiff's attending physician was asked: "What did you observe about the effect on his mind of this dog bite, if any?" and the answer was: "Well, he was mentally depressed." *Held*, that the question and answer were admissible. So far as the answer involved matter of opinion it was something in regard to which the witness as a physician was clearly competent to testify. Opinion by MORTON, J.

Person bitten by dog — Bailor and bailee. — *EMMONS ET AL. v. STEVANE ET UX*, (*New Jersey Errors and Ap-*

peals, June, 1909) 73 Atl. 544, was an appeal from judgment for defendants in the Supreme Court. See decision in 73 N. J. Law, 349, 64 Atl. 1014. VOORHEES, J., in his opinion, said:

"This action is brought by Ella Emmons and John G. Emmons, her husband, against Albert Stevane and Ida F. Stevane, his wife. Mrs. Emmons, one of the plaintiffs, on the 23d day of January, 1903, was severely bitten by the defendant's dog Nero. The circumstances are these: She went to the door of her house and found the dog lying on the porch. She spoke to him and placed her hand on his head, when, without warning, the dog yelled, jumped at her, and bit her severely about the throat. Mr. Stevane and his wife in September preceding had gone to board at the home of Mrs. Emmons in Asbury Park. Two Irish setter dogs, Nero and Rex, were brought with them, Mrs. Emmons being paid five dollars per month board for each dog. The Stevanes boarded with the Emmons family until December following when, upon leaving to go south upon a trip, they arranged that the dogs should remain in the care of Mrs. Emmons, and agreed to continue to pay five dollars per month for each dog so long as they remained. The trial judge directed the jury to find a verdict for the defendants. That direction is brought under review by this writ of error.

"The declaration alleges owner-

ceptions embodying all the evidence and the rulings of the court complained of, which were signed by the judge and made a part of the record.

The case is here for review upon writ of error granted to the defendant. A number of errors are assigned; but the case depends upon a decision of the following questions: 1. Is the owner of a boar guilty of such negligence in suffering him to run at large as will render him liable for an injury inflicted on the person of another while straying on the land of the injured person. 2. In such case

ship of the dog in both defendants. The first two counts are framed on allegations that the dog was known to the defendants to be vicious, and to have attacked and bitten mankind. The third count alleged that the defendants requested the plaintiffs to accept the dog to board, representing that he was of a gentle disposition, and that Mrs. Emmons, believing such to be the case, agreed to board him, while in truth the defendants well knew the dog to be savage and vicious. As to Mrs. Stevane's responsibility we are satisfied with the disposition made by the Supreme Court of that aspect of the case under the facts as then presented wherein it was held that there was no liability on the part of Mrs. Stevane. *Emmons v. Stevane*, 73 N. J. Law, 349, 64 Atl. 1014." * * *

After reviewing a number of "Animal cases," the court concluded:

"The trial judge having erred in directing a verdict in favor of the defendant Albert Stevane, it results that the joint judgment in favor of both defendants must be reversed, although the defendant Ida F. Stevane was properly entitled to a verdict and judgment in her favor. Let the judgment under review, therefore, be reversed, and judgment final be entered in favor of Mrs. Stevane against the plaintiff, with award of a *venire de novo* as against Albert Stevane."

The official syllabus states the points decided in the *Emmons* case as follows:

"1. In an action for injuries committed by a dog, it is not necessary that the same injury should have actually been committed by the animal to the knowledge of its owner, but knowledge by the owner that the disposition of the animal is such that it is likely to commit a similar injury to that complained of is sufficient to maintain the action.

"2. *Scienter* need not be precisely similar, but that it is substantially so will suffice.

"3. The right of the action against the owner of a vicious dog arises from the knowledge by the owner of its vicious propensities, and, such propensities having been established, there remains no presumption in law that the animal may not display them towards its keeper as well as against a stranger.

"4. The owner of the animal having vicious propensities, which are directly dangerous, is bound to disclose them, if known to him, to a bailee.

"5. A representation made to the bailee by the bailor of a vicious animal that such animal is of gentle disposition, when the bailor knows to the contrary, will render such bailor liable in an action against him by the bailee for injuries inflicted upon the latter by such animal, at least

is it necessary to prove that the owner had previous knowledge of the vicious propensity of the animal? 3. If, so, is it proper to prove such knowledge constructively by expert testimony concerning the propensity of boar hogs in general to become vicious after a certain age?

It was the rule of the common law that the owner of animals was required to confine them on his own premises, and if he failed to do so, and they trespassed upon the lands of another and did injury either to his close, person, or animals, defendant was liable. Thus

in the absence of proof that the bailee was chargeable with knowledge of its true disposition."

Child riding on sled in street attacked by a dog — Owner of dog liable. — In *KING v. MULBOON*, (N. Y. Supreme Court, Appellate Division, Second Department, April 1909) 116 N. Y. Supp. 308, judgment for plaintiff at the Trial Term, Westchester county, was affirmed, the opinion being rendered by WOODWARD, J., as follows:

"The plaintiff, an infant, was bitten by a dog, alleged to belong to the defendant, on the first day of January, 1904. There is no question raised as to the extent of the injuries, or to the fact that the plaintiff was bitten. The questions litigated were whether the defendant owned the dog which did the biting, and whether the defendant had notice of the vicious tendencies of the dog; it being urged on the part of the defendant that the evidence did not warrant the submission of these questions to the jury.

"It appears from the evidence, without dispute, that the plaintiff was riding upon a hand sled, attached to the rear end of a vehicle being driven by his mother, on the first day of January, 1904. He was lying on the sled on his stomach, and while in that position, and while passing the defendant's premises, upon the highway, a number of dogs ran out, and

one of them bit him. At this point there is a conflict in the evidence. One witness testifies that there were seven dogs, some of which came from a neighboring place, and there was evidence tending to show vicious characteristics upon the part of these neighboring dogs, which were described as being St. Bernards, while the dogs which belonged to the defendant were collies. The plaintiff's witnesses insist that there were but four dogs involved in the matter, and that none of these were St. Bernards, while the plaintiff himself testifies that he was bitten by a particular member of the group of four dogs, known as the 'old dog.' The evidence also showed that one witness at least had made complaint of this particular dog to the housekeeper of the defendant, who testified that she was in general charge of the place in the absence of the defendant, and that this complaint was made at a time when the master was not at home. The learned court charged the jury correctly upon the law of the case, no objection being made to the same, and we are of the opinion that there was no reversible error in the case. The evidence, while conflicting, was sufficient to support the verdict, and, there being no exceptions of merit to the rulings of the court, the verdict of the jury will not be disturbed." Judgment affirmed. All concur.

it was held in an English case where a horse bit and kicked a mare through a fence that the owner of the horse was liable. Lord Coleridge in that case says: "It seems to me sufficiently clear that some portion of the defendant's horse's body must have been over the boundary. That may be a very small trespass; but it is trespass in law." *Ellis v. Loftus Iron Co.*, L. R., 10 C. P., 110 (1 Am. Neg. Cas. 41). But the rule of the common law requiring the owners of animals to keep them confined on his own land is no part of the law of West Virginia. This court decided in *Blaine v. R. R. Co.*, 9 W. Va. 252, and *Baylor v. R. R. Co.*, 9 W. Va. 270, that this rule of the common law had no general application in this State, except in regard to animals that are unruly and dangerous. These decisions were later approved in the case of *Layne v. R. R. Co.*, 35 W. Va., 438, 14 S. E. 123. Section 2730, Code 1906, has no bearing on this case. Acts 1882, p. 412, c. 131, of which said section is a part (in section 4 of said Act, or section 2733 of the Code), excepts from the operation of the Act so much thereof as relates to the running at large of "bulls over one year old, buck, sheep over four months old and boars over two months old," unless and until it shall have been adopted by a vote of the people of any county desiring to put such part of the Act in operation in such county; and there is no evidence in the case that such provision was ever adopted as a part of the law in Hancock county. Therefore defendant was not negligent in permitting its boar to run at large. This answers the first question, unless the animal was vicious and dangerous.

But plaintiff alleges that defendant had knowledge of the vicious propensity of the boar. It was also necessary to prove it had such knowledge. Domestic animals, as a general rule, are not vicious, and are not liable to attack mankind; and, in order to make out a case entitling one to recover for injury to his person inflicted by such domestic animals, it is necessary to allege and prove a scienter. Ingham in his work on the Law of Animals, § 94, says: "Except in the case of animals *feræ naturæ*, it is essential to show that the owner or keeper of an animal knew of its vicious or dangerous disposition; otherwise there can be no recovery for the injury committed by it." And in support of this he cites a long list of decisions by both the courts of England and of this country. These authorities we deem it unnecessary to review in this opinion, since this is well-established law, stated by all the text-writers, and recognized by all the courts. The rule is thus stated in 2 Am. & Eng. Ency. of Law, 364: "If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless

he had knowledge of the vicious propensity of such animals; and, in an action for such injuries, knowledge on the part of the owner must be alleged and proved." This is no variation from the rule above quoted from Ingham, as applied in the present case, because the law in West Virginia is that a man must fence against trespassing animals, and not that the owner of such animals must confine them on his own land. There being no lawful fence inclosing plaintiff's land, the hog was not trespassing at the time it inflicted the personal injury on plaintiff. 1 Thompson on Negligence, § 845, says that the trend of most decisions is to break away from the ancient rule which made the keeper of a vicious animal, having knowledge of its vicious propensity, liable at all hazards for injury done by it, and to hold him liable only in case of some negligent act as the proximate cause of the injury. But it matters not which principle be applied in deciding his case, as either one leads to the same conclusion. In either case proof of scienter is necessary. In the one case if he does not take reasonable precaution to restrain the animals after such knowledge, actual or constructive, he is liable for negligence, and in the other he is liable in any event as an insurer against injury by such vicious animals. There was no negligence on the part of the defendant in suffering the boar to run at large because defendant did not know its boar was vicious, and because it was not obliged, by the laws of this State, to confine it on its own land. The rule is laid down by the Supreme Court of Maine in the case of *Decker v. Gammon*, 44 Me. 322, 1 Am. Neg. Cas. 300, as follows: "If damages be done by any domestic animal kept for use or convenience, the owner is not liable to an action on the ground of negligence without proof that he knew that the animal was accustomed to do mischief before, if such animal is rightfully in the place where it does the mischief." In the next point of the syllabus the converse of the rule is stated: "If domestic animals are wrongfully in the place where they do the mischief, the owner is liable for it, though he had no notice that they had been accustomed to do such mischief before." There are two elements of negligence involved in this Maine case, only one of which has application to the case under review, and that is the keeping of a vicious domestic animal with knowledge of its vicious propensity. The second element does not apply in West Virginia, unless the animal trespasses upon the land of another inclosed by a lawful fence. In such case the owner of the trespassing animal might be liable, under section 2735, for a personal injury inflicted by the animal, as well as for injury done to the close. This question, however, we do not decide,

as it does not arise in the case. In Maine the rule of the common law of England prevails, making it the duty of the owner of animals to keep them on his own land. All of the following cases hold the owner of the animal liable either on the ground that the owner kept the animal after having knowledge, actual or constructive, of his vicious character, or that he negligently permitted the animal to trespass on the lands of another: *Cockerham v. Nixon*, 33 N. C. 269, 1 Am. Neg. Cas. 236; *Vrooman v. Lawyer*, 13 Johns. (N. Y.) 339, 1 Am. Neg. Cas. 33; *Godeau v. Blood*, 52 Vt. 251, 1 Am. Neg. Cas. 251; *Knowles v. Mulder*, 74 Mich. 202, 1 Am. Neg. Cas. 149, 41 N. W. 896; *Muller v. McKesson*, 73 N. Y. 195, 1 Am. Neg. Cas. 188; *Turner v. Craighead*, 83 Hun. 112, 1 Am. Neg. Cas. 235; *McIlvaine v. Lantz*, 100 Pa. St. 586, 1 Am. Neg. Cas. 339; *Lyons v. Merrick*, 105 Mass. 71, 1 Am. Neg. Cas. 304; *Jenkins v. Turner*, 1 Ld. Raym. 109, (1 Am. Neg. Cas. 33, 200, 429). In the case of *Hayes v. Smith* (decided by the Supreme Court of Ohio in 1900) 62 Ohio St. 161, 56 N. E. 79, 7 Am. Neg. Rep. 493, which was an action for damages for personal injuries inflicted by a vicious dog, the court based the right of recovery upon the "keeping of the dog in a negligent manner, after knowledge of his vicious propensities, rather than the keeping of the animal with such knowledge." The case of *Congress and Empire Springs Co. v. Edgar*, decided by the Supreme Court of the United States, and reported in 99 U. S. 645, 1 Am. Neg. Cas. 375, is a case upon which defendant in error apparently places greatest reliance. That was an action brought by a lady who had been attacked and injured by a buck deer kept by the Springs Company in its park among others of its kind to enhance the attractions of the park, which apparently was a health and pleasure resort. The plaintiff recovered a verdict for \$6,500, and the court refused to disturb the judgment of the lower court. It does not appear that the animal had ever attacked a person on any previous occasion; but there was expert testimony in the case to show that a buck deer in the fall of the year, the season at which the complainant was injured, is liable to become vicious and attack persons. And there was further evidence that there were signs posted up at various places in the park warning persons to "Beware of the Buck." There was no other evidence that the company had any knowledge of the vicious propensity of the animal. But that was an action for an injury done by an animal *feræ naturæ*; and the liability in such case depends upon a different rule of law than it does in case of injury done by domestic animals. Mr. Justice Clifford, speaking apparently for the whole court, in the opinion makes the distinction

clear. In the opinion he says: "Owners of wild beasts that are in their nature vicious are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large." On the same page of the opinion the judge further says: "Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that, if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious; and in suits for such injuries such knowledge must be alleged and proved, as the cause of action arises from the keeping of the animal, after the knowledge of its vicious propensity." In support of this proposition he cites a number of authorities. We find no authorities which hold that the owner or keeper of a domestic animal is liable on account of injury done to another unless it is shown, 1, that the owner continued to keep the animal after knowledge, either actual or constructive, of the vicious propensity of the animal, some of the courts holding that after such knowledge he is liable in any event, and other courts holding that he is liable only in the event of the negligent keeping of the animal; or, 2, that the injury was committed while the animal was trespassing on the lands of another, in which case it is only necessary to show negligence in the owner in failing to keep the animal on his own land, knowledge of the vicious propensity of the animal in the latter case being unnecessary.

Apart from the attack made on the defendant, the only other evidence of the hog's viciousness is the testimony of J. D. Stewart and of a son of plaintiff, George Johnston, Jr. The latter testified that he had chased it off his father's place a few times, that one time he and his brother were chasing it off, and it turned on them, and he says: "We jumped over the fence into the pig yard, and got away from it." But he thought so little of the occurrence that he is not sure whether or not he so much as told his father of it, much less complained of it to the owner. Stewart said that on one occasion he was passing along the road, the boar was standing off to one side, and as he passed by the boar "made a jump at him," and that he jumped to one side and dodged him; that the boar turned and came back; and that he "picked up a boulder, and threwed it at him, and he started off." This was not identified as the same boar that injured plaintiff. Witness said that he did not take notice

whether or not it had tusks. There is no evidence whatever that defendant knew this particular hog was vicious, but, on the contrary, four or five witnesses prove that during the time, three or four months, that defendant owned it, it had free range of the fields of defendant with its other hogs; that it frequented the premises of defendant's numerous tenants; and that it had never at any time exhibited any signs of viciousness, or shown any disposition to attack any one. Two or three witnesses testified that they had kicked it out of their way; that they had seen children, not over ten or twelve years old, drive it away from their houses with sticks. One witness says he saw his wife strike it over the head with a bucket and drive it from the trough where she had fed her own pigs; another man that he had driven it from his yard by the motion of his hands. So that the overwhelming weight of evidence shows that the particular hog in question was not as a matter of fact vicious.

The expert testimony of Howard A. Hill, a breeder of hogs, was received over the objection of defendant to prove that boar hogs become vicious, and are likely to attack other animals and even persons after a certain age, unless their tusks are broken off. But it is a matter of common knowledge that domestic animals are not vicious as a general rule; and upon this common knowledge rests the principle which requires proof of knowledge by the owner before he can be held liable for the vicious act of his animal, except, perhaps, in case of certain animals which the statute prohibits from running at large. The boar is not made an exception by the statute. The reverse of the fact testified to by the expert is a matter of common knowledge; and expert testimony cannot be received either to prove or to disprove those things which the law supposes to lie within the common experience and common education of all men. Rogers on Expert Testimony (2d ed.), § 8; 1 Wharton on Evidence, § 436. But if it could be said that this expert testimony was admissible, it would cut like a two-edge sword; because, while it would prove negligence on the part of the defendant in failing to confine the boar, it would also affect plaintiff, and convict him of contributory negligence, as the proximate cause of his injury, in getting down from the building where he was at work, and approaching the hog unarmed to drive it away from the fence. This is the first time this court has been called upon to review a case involving personal injury inflicted by a vicious hog; nor have we been able to find where any other court has decided a similar case. Consequently the very novelty of the case, in view of the prevalence of

the hog and man's familiarity with his natural propensities, is a contradiction of the expert testimony. Reports of the various courts of this country are replete with cases involving injuries from biting dogs, kicking horses, vicious bulls, and an occasional case may be found where an owner has been held to account for the butting of his ram, but this is the first case of which we have any knowledge where the hog has so far departed from his usual habits of gentleness as to savagely bite and injure man. There would, therefore, seem to be less reason for demanding expert testimony to prove the general propensity of the hog than there would be in the case of the horse, the ox, or the sheep. All domestic animals stand in the same category, except where the rule applicable thereto has been modified by statute, and, under the law of this State, no evidence short of proof that defendant knew or by reasonable diligence should have known that its hog was of a vicious disposition or propensity will suffice to sustain a verdict for damages for the injury. We think the expert testimony was improperly admitted, and was prejudicial to plaintiff in error. Without such testimony there is not the slightest evidence in the record to support the verdict. It was an unfortunate occurrence, and a serious injury to plaintiff, but it is not shown that defendant was guilty of any wrong or negligence, and the law does not hold it liable.

We deem it unnecessary to review the other points of error assigned. Our conclusion is that the verdict is contrary to the law and the evidence, and that it was error not to set it aside. We therefore reverse the judgment, set aside the verdict, and, according to the established practice of this court, remand the cause for a new trial; it not being made to appear clearly that the plaintiff may not be able on a second trial to strengthen his case.

BEARD v. INDEMNITY INSURANCE COMPANY.

Supreme Court of Appeals, West Virginia, March, 1909.

1. INSURANCE — ACCIDENT POLICY — EVIDENCE. — In an action on a policy of accident insurance, evidence that insured was found lying at the bottom of a wall, badly injured, near the unrailed top of which he was reclining on a bench only shortly before, alone, and in the darkness of night, makes a *prima facie* case of injury by violent, external, and accidental means.
2. SAME — PRESUMPTIONS AND BURDEN OF PROOF. — In such case, unless the injury is shown to have been intentionally self-inflicted,

or intentionally inflicted by some other person, the legal presumption is that it was accidental.

3. SAME — DEFENSE — INTOXICATION. — Where an accident policy is conditioned against liability for injury happening while insured is intoxicated, and where plea in that behalf is to be successfully relied upon, the evidence must show that insured was actually intoxicated at the time the accident befell him (1).
4. EVIDENCE — INTOXICATION — APPEARANCE BEFORE AND AFTER TIME OF INJURY. — Evidence as to appearances of intoxication, or their absence, by witnesses who saw insured immediately before or after the injury, is proper and admissible in that behalf.
5. EVIDENCE — SIMILAR ACTS OR CONDITION. — It is a general rule that, where the issue is whether a person did a particular thing, or was in a particular state, the fact that he did a similar thing, or was in a similar state, at some other time, is inadmissible.
6. INSURANCE — ACCIDENT POLICY — RISKS AND EXCEPTIONS — RAILROAD OR BRIDGE. — In an accident policy, excepting liability for injury to insured while on the roadbed or bridge of a railway, the manifest intention is to exempt the insurer from responsibility for injury caused by collision with moving trains thereon.
7. INSURANCE — ACCIDENT POLICY — "VOLUNTARY EXPOSURE TO UNNECESSARY DANGER." — In an accident policy which exempts liability as to an injury caused by the insured's "voluntary exposure to unnecessary danger," those words are properly interpreted to refer only to danger of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, in tending at the time to assume all the risks of the situation (1).
8. SAME — EXEMPTIONS FROM LIABILITY — STRICT CONSTRUCTION. — Words of exception from liability, in an accident insurance policy, are construed liberally in favor of the insured.
9. SAME — "VOLUNTARY OR NEGLIGENT EXPOSURE TO UNNECESSARY DANGER." — The phrase "voluntary or negligent exposure to unnecessary danger," in a policy of accident insurance exempting the insurer from liability for injury from cause so expressed, is a cumulative or redundant expression, and is properly interpretable as "voluntary exposure to unnecessary danger" (2).
10. SAME — "VOLUNTARY EXPOSURE TO UNNECESSARY DANGER." — Sitting or lying on a bench at the side of a building, near the top of an unguarded wall, on a dark night, it not appearing that insured in so doing was conscious of the pitfall, or had knowledge of his surroundings, is not "voluntary exposure to unnecessary danger," within the meaning of those terms in a policy of accident insurance, exempting

1. See *Bakalars v. Continental Casualty Co.* (Wis.) 122 N. W. 721, reported with notes of "accident policy cases" at end of the case at bar.

2. See notes of "accident policy cases" at end of the case at bar in which the phrase "voluntary exposure to unnecessary danger" is discussed.

the insurer from liability for injury caused by such exposure as is defined by said terms (3).

11. NEW TRIAL — SETTING ASIDE VERDICT. — A verdict fairly rendered, in a case fairly submitted to a jury, should not be set aside by the court, unless manifest injustice has been done, or the verdict is plainly not warranted by the evidence.

(*Syllabus by the Court.*)

ERROR to Circuit Court, Cabell County.

ACTION by Thomas Beard against the Indemnity Insurance Company. From a verdict for plaintiff, and from an order setting the same aside and granting a new trial, plaintiff brings error. The facts appear in the opinion. *Reversed.*

WYATT & GRAHAM, for plaintiff in error.

MCCOMAS & NORTHCOTT, for defendant in error.

ROBINSON, J. — On the trial of an action upon a policy of insurance against death resulting from bodily injuries caused by external, violent, and accidental means, a verdict was rendered by the jury in favor of the beneficiary for the amount to be paid by the insurer upon the happening of such contingency. That amount was \$1,000. The verdict was set aside as contrary to law and the evidence, and a new trial was awarded. To that action of the court below this writ of error is prosecuted.

To justify the aforesaid action of the court it must be found that errors were committed at the trial to the prejudice of the defendant, or that the verdict was contrary to law and the evidence. *Robinson v. Kistler*, 62 W. Va. 489, 59 S. E. 505. The defendant does not complain that errors to its prejudice were made at the trial of the case. It relies upon the assertion that the verdict was contrary to law and the evidence. Then it is as to this assertion only that we are called upon to inquire.

The real substance of the evidence is as follows: The insurer was found, some time between 9:30 and 10:30 o'clock at night, badly injured, at the foot of a high wall where Sixteenth street, in the city of Huntington, passes under the tracks of the Chesapeake & Ohio Railway. He was unconscious at the time, and died a few hours later in a hospital, never having regained consciousness. Just before he was found injured, insured was seen lying on a bench by the side of the telegraph office, which is situated at the top of this wall, very near its edge, and just above the point at which he was found. The telegraph office is near the railway tracks, and on a

3. See notes of "accident policy cases" on various causes of injury, reported at end of the case at bar.

level therewith, it seems. The wall is one necessary to the lowering of the street so as to make the street cross the railroad under grade. At the telegraph office it was not guarded by a railing. The night on which the injury occurred was dark, and the electric light at the intersection of Sixteenth street and the railroad was not burning. The insured was an extra locomotive fireman of the railway company. His run was from Russell, Ky., to Handley, W. Va. He frequently stayed with his brother, the beneficiary of the policy, who resided in Huntington; but he had not been there for several days. The road foreman of engines testifies that men making such run out of Russell, but living in Huntington, frequently board trains at the telegraph office above designated to deadhead to Russell. There is no direct evidence, however, that the insured was ever at this telegraph office before. The yard clerk, whose duties were at that place, and whose office was located there, when asked if he had ever seen the insured come there to take a train, replied: "I don't know whether I ever saw him; no, sir." No one knows just how the injured man came to fall from the wall. A hostler who was attending some engines there saw the insured lying on the bench as he passed into the office. The insured was still lying there when this hostler came out of the office, and walked to the upper end of the railway bridge over the street. When he reached that part of the bridge, he heard an unusual noise. He at once returned towards the office, and noticed that the insured was not on the bench. An investigation was immediately made, and insured was found below the wall as mentioned above. The yard clerk testifies that he saw the insured sitting on this same bench near the same hour above named, that he addressed him in a friendly way, and that the insured answered. He did not know the insured personally. It was this yard clerk and the hostler who found him at the bottom of the wall. Both testify that they observed no evidence of intoxication, either before or after they found him. By the police judge it was proved that two or three days before the accident the insured had been brought into his court on a charge of drunkenness. Insured was comparatively sober at the time he was tried. He was not again seen by said official. The secretary of the insurance company testifies that he saw the insured the day before he was injured, and that he was then intoxicated. A policeman testifies that he saw him near a saloon some time after supper the evening on which the accident occurred, and adds that it was "between eight and half-past ten o'clock. I can't tell just exactly what time." The policeman says the insured "looked like he was intoxicated right smartly

when he came through." It seems that the insured passed through the saloon. The policeman, however, says that he was not drunk enough to be arrested; that he was not disturbing the peace; that he did not smell insured's breath, and that he did not see him drink anything. He testifies that the saloon was crowded, but can name no other of the many people there; nor can he tell how the insured was dressed, what kind of hat he wore, or whether or not he had on his working clothes. The physician who attended the injured man as a witness for plaintiff described the extent of the injuries, and the result thereof. This witness, though, was not examined by either party as to whether or not any evidence or appearances of intoxication were manifest.

The policy provided that it did not cover any injury occasioned wholly or partly, directly or indirectly, by many things, among them being intoxication, and voluntary or negligent exposure to unnecessary danger. And it also provided no insurance against injury received while the insured was on a railroad bridge or roadbed, except as to railway employees while on duty incident to their occupation.

The insured company defended under the general issue and by three special pleas, relying upon the averments that the insured was intoxicated at the time of the injury to him, that such injury was due to voluntary or negligent exposure to unnecessary danger by insured, and that the injury was received while the insured was on a railroad bridge or roadbed at a time when he was not on duty incident to his occupation as a railway employee. These defenses, except the last named, were further availed of by three instructions asked and given on behalf of defendant. The first instruction was to the effect that the jury should find for the defendant if they believed from the evidence that the insured was in a state of intoxication at the time he received the injury which caused his death. The second instruction was that the jury should find for the defendant if they believed from the evidence that the insured voluntarily or negligently exposed himself to the unnecessary danger which resulted in the injury that caused his death. The third was to the effect that the jury should find for the defendant if they believed from the evidence that at the time of the accident complained of the insured was intoxicated, and that by reason of such intoxication he stepped or fell from the top of the east wall of the Sixteenth street undergrade crossing, receiving the injury which resulted in his death.

Thus we see the issues submitted to the jury were plain. The plaintiff sought to establish injury, from which death resulted to

the insured, by violent and accidental means. The defense sought to establish intoxication, voluntary or negligent exposure to unnecessary danger, or that the insured was on a railroad bridge or roadbed, at the time of the injury. The sufficiency of plaintiff's evidence was not challenged by defendant at the trial. The defendant rested the case with the jury, relying upon instructions given in its behalf, as we have noted. Plaintiff asked no instructions, relying solely on his evidence. But after the verdict had been found against defendant on motion for a new trial, and now upon this writ of error to the order setting aside that verdict, much is argued as to the insufficiency of the case made to sustain plaintiff's issues. It is now insisted that it is not proved that the insured met his death by accidental means, that he may have committed suicide, or that another may have pushed him over the wall. The testimony on this point was sufficient to go to the jury. As we have seen, the insured, alone, was lying on the bench when the hostler, who later evidently heard him fall, passed into the office and out again going to the bridge. The distance this witness went before he was attracted by the noise was very short. It seems conclusive that the noise was caused by the insured's fall over the wall. There is no evidence of the presence of another at this time, or of the retreat of any murderer. Neither does the evidence reasonably indicate suicide. The jury could well believe from the evidence, and it seems satisfactorily so, that the insured rose from the bench in the darkness and walked over the wall. There is no evidence that he was acquainted with his surroundings. The jury were justified in finding, from the facts and circumstances, that his death was due to violent and accidental means. A *prima facie* case of accidental death was made. Defendant did not even undertake to rebut such *prima facie* case. Directly pertinent to this case is Niblack on Insurance, § 377. Therein it is stated: "In an action on an accident policy testimony of physicians that the assured bore on his back marks of extreme violence, apparently recently inflicted, and that his injuries produced his death, is *prima facie* evidence of death resulting from bodily injuries, "through external, violent, and accidental means;" unless such injuries were intentionally self-inflicted, or intentionally inflicted by some other person, the legal presumption is that they were accidental. No presumption can be indulged that the law has been violated, as it would have been were the injuries inflicted by another. There may be a *prima facie* case of accidental death, but the burden of proving accidental death is on the plaintiff. Where it appears that a violent death was either the result of acci-

dental injuries, or of a suicidal act of the deceased, the presumption of law is against the latter."

Is there in the record evidence of intoxication of the insured at the time of the injury? The mere fact that he had been drunk before does not prove that he was drunk at the time of the injury. Drunkenness at that time must be established if it is to avail as a defense. The only testimony that he was intoxicated near the time of the accident is that of the policeman, and that witness cannot definitely fix the time so as to bring it near enough the time of the accident to justify the jury in believing that he was drunk when the accident happened. The jury saw this witness, heard his cross-examination, and had a right to accept or reject his credibility. He confesses, as shown by that cross-examination, that he took little notice of the insured when he saw him. He says that he was intoxicated, yet he could not tell how insured was dressed. Nor can he tell what else he saw at the saloon. It seems that he noticed only that this man was drunk. The jury could well say that his statement that the man was drunk was improbable. The fact that the insured was about the saloon and had been drunk on two former occasions is not evidence that he was intoxicated when the injury befell him. It is a general rule that, where the issue is whether a person did a particular thing, evidence as to the fact that he did a similar thing at some other time is inadmissible. 1 Wharton on Evidence, § 29. The two witnesses who saw insured just before and after the injury say that they saw no evidence of intoxication. And such evidence, as compared with that relied upon herein to establish intoxication, was for the consideration of the jury. Evidence of appearances as to intoxication is proper in this class of cases. Niblack on Insurance, § 390.

The claim of the defendant that the insured was on the bridge or roadbed of the railway company is in no wise sustained. And at the time of asking instructions to the jury this claim seems to have been abandoned by the defendant. There is not the slightest evidence to sanction defense on this ground. Insured was not on the roadbed or bridge of the railway. Besides, as to a clause exempting from liability for injury to insured while on such roadbed or bridge, it is wisely said that "the manifest intention is to exempt from responsibility for damages caused by collision with moving trains thereon." *Burkhardt v. Insurance Co.*, 102 Pa. St. 262.

Was there a voluntary or negligent exposure to unnecessary danger on the part of insured? It is insisted that the injury was caused by his negligence, and that the insurer is therefore not liable. In

this case the clause of the policy conditioning recovery by the words "voluntary or negligent exposure to unnecessary danger" is at least different in phraseology from that usually found in accident policies and met with in judicial interpretation. The most usual expression passed upon in the reported cases is "voluntary exposure to unnecessary danger." A clause similar to the one last mentioned was under consideration by this court in *Diddle v. Continental Casualty Company* (decided at this term) 63 S. E. 962 (4). It was therein held that "either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were such as necessitated the encountering thereof," constituted such voluntary exposure. That holding is clearly sustained by authority and principle. Vance on Insurance, § 240, says: "It is a familiar principle that the insurer assumes the risk of the insurer's negligence, provided there be no bad faith on the part of the latter. Accident insurers, however, have essayed to change this rule, and to import into the insurance contract the doctrine of contributory negligence by inserting a provision excepting themselves from liability for 'injury or death caused by the voluntary exposure of the insured to unnecessary danger,' or other words of similar effect. This exception merely imposes upon the insured the duty of exercising ordinary care in order to avoid sustaining any sort of injury. He is not required to exercise any unusual degree of care." The eminent Mr. Justice Harlan, in *Travelers' Ins. Co. v. Randolph*, 78 Fed. 761, 24 C. C. A. 312, said: "What do the words, 'voluntary exposure to unnecessary danger' in the contracts in suit import? * * * The words 'voluntary exposure to unnecessary danger,' literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risk of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is therefore the interpretation which the court should adopt." In

4. See report of *Diddle v. Continental Casualty Co.*, (W. Va.) 63 S. E. 962, at end of the case at bar.

De Loy v. Travelers' Ins. Co., 171 Pa. St. 1, 32 Atl. 1108, it is held, most sensibly we think, "that if a man acts so recklessly and carelessly that he shows an utter disregard of a known danger, he may be said to have exposed himself voluntarily to danger." The same case further affirms that, "if the risk of danger is so obvious that a prudent man, exercising reasonable foresight, would not have done the act, then he may be said to have voluntarily exposed his person to danger."

Now does the use of the word "negligent" in the clause demand from the insured a greater degree of prudence and care than that enunciated in these authorities? The rule is now firmly established that limitations on the liability of the company are construed most strongly against the insurer, or liberally in favor of the insured. Niblack on Insurance, § 367; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896. Chancellor Kent says that the true principle of sound ethics is to give a contract the sense in which the person making the promise believes the other party to have accepted it, and a just sense should be exercised in so interpreting it as to give due and fair effect to its provisions. 2 Kent Com. 555. This just principle of interpretation applies fittingly to contracts of accident insurance. Are we to say that the use of the word "negligent," as aforesaid, is to exempt the insurer from all liability because perchance some slight negligence of the insured has contributed to accidental injury? To do so would result in the destruction of the real purpose of indemnity of this character. It has been pertinently said: "A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus men are injured by the careless use of firearms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterwards that a little greater care on their part would have prevented it. * * * It is true that accidents often happen from such kinds of negligence. But, still, it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle — the servant fills the lighted lamp with kerosene — a hundred times without injury. The next time the gun is discharged and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are undoubtedly thousands of

persons who get on and off from cars in motion without accident, where one is injured. And therefore, when an injury occurs, it is an unusual result and unexpected, and strictly an accident." *Schneider v. Insurance Co.*, 24 Wis. 28. And here we approvingly quote from *Rustin v. Insurance Co.*, 58 Neb. 792, 79 N. W. 712. "Accident insurance is not designed to furnish indemnity only in cases where the policy holder orders his conduct with grave circumspection and provident foresight of consequences. Mere contributory negligence is no answer to an action on a contract of insurance." Therefore an insurer against accident must be relieved from liability because of mere contributory negligence, unless the contract is plain and unequivocal that it should be. Surely we shall not say that the word "negligent" is to be given a meaning indicating a degree of exposure less than that indicated by the word "voluntary" which is used before it in the clause in the policy under consideration. To give it such construction would grant almost limitless scope to the ingenuity of insurance companies in framing contracts of this character so as to make the exceptions in fact destroy the real purpose for which the insurance was obtained. Used, as it is, in connection with the word "voluntary," it is fairer to say that it is simply cumulative to that word, meaning no more than that word. Or its use in the clause may fairly be said to be redundant, since in a practical sense every exposure of one's body to an unnecessary danger is a negligent exposure to such danger. In view of the well-established rule of construction in such cases, the true purposes of such contracts, and the connection in which the word "negligent" is used we hold that its use is simply cumulative or redundant, and that the clause means no more than "voluntary exposure to unnecessary danger." Using the language of Mr. Justice Harlan, as quoted above, "the latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the objects of accident insurance contracts, and is therefore the interpretation which the court should adopt."

The evidence does not justify the conclusion, as a matter of law, that the insured voluntarily exposed himself to unnecessary danger, within the meaning of those terms as applied to cases of this character. Whether he did so expose himself, therefore, was a proper question for the determination of the jury from all the facts and reasonable inferences in that regard. Nor can it be justly said that the jury's evident finding that he did not so expose himself to such danger is plainly wrong, amounting to a miscarriage of justice. Really it was not proved that insured was even guilty of contributory

negligence, to say nothing of the degree of negligence required to be shown under such a clause as the one under which exemption from liability is claimed. It does not appear that the insured had knowledge of his surroundings, or of any danger near him, when the accident befell him. Where the danger is unknown, the injury is accidental, not the result of voluntary exposure. The mere custom of railroad employees who make runs out of Russell to catch trains for that place at the telegraph office near which the injury occurred does not prove that the insured ever followed that custom. That circumstance of itself is sufficient. Yet it is all there is in the evidence from which it can be said that insured was ever at the bench on a previous occasion. Nobody says that he was there before, or that he was acquainted with the surroundings. It is true that his run as fireman was by this place, but he cannot be reasonably charged with knowledge of situations at places in view of which he passed as such employee, engaged in duty requiring his attention to the train. For all that is known, he may have prudently gone to this place for the first time, found the bench, and occupied it reasonably believing himself perfectly safe on that which was evidently provided for others. The electric light was not burning. Its accidental failure to burn may have prevented his observing the pitfall. That he was about a city at night is not negligence, unless it were shown that he went to a place which he knew to be dark and dangerous, or that he should reasonably have known it. Sitting or lying on a bench near the top of an unguarded wall is not voluntary exposure to unnecessary danger within the meaning of those terms in a policy of accident insurance, even if it were shown that the insured knew of the wall and the lack of railing on it. Prudent men do such things. There is no danger while one's faculties are present. Sudden loss of those faculties would be merely accidental, unexpected. It is not shown that insured was asleep on the bench, or that he intended to sleep there. He may have never intended to sleep on it, yet he may have accidentally gone to sleep. And it may have been that while in that state he rose from the bench and fell over the wall. In *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 16 N. W. 47, injury under similar circumstances is held not to be the result of voluntary exposure to unnecessary danger. And elsewhere it is held: "One who lies down to sleep on the top of the boilers of a steamboat, and is there injured by steam escaping from a safety valve, is not guilty of voluntary exposure to unnecessary danger, though warned not to sleep there, unless he was conscious of the danger from escaping steam from the safety valve." *Travelers'*

Ins. Co. v. Clark, 109 Ky. 350, 59 S. W. 7. In all the cases there runs the demand that the danger shall be of a substantial kind, shall be unnecessary, known, or obvious, and that the exposure to it shall be of a reckless or deliberate character.

These observations upon the evidence are sufficient, we think, to show the insufficiency of the evidence relied upon to sustain exemption because of voluntary exposure to unnecessary danger. By the sound inferences to be drawn from all the facts and circumstances it is not established that there was exposure to danger of the substantial kind that will excuse from liability, or to any danger that was obvious to insured. In *Travelers' Ins. Co. v. Clark*, 109 Ky. 350, 59 S. W. 7, it is held: "The words 'voluntary exposure to unnecessary danger,' when employed in a contract of life and accident insurance, relate to dangers of a substantial character which the insured recognizes, and to which he, nevertheless, consciously and purposely exposes himself, intending at the time to assume the risk of the danger." Upon the evidence adduced in the case the issues were properly to be disposed of by the jury. The verdict is not against the decided weight and preponderance of the evidence. The case was fairly submitted to a jury. A verdict was fairly rendered by that jury. No manifest wrong or injustice appears. The verdict is not unwarranted by the evidence. Under such circumstances what justification can there be for disturbing the verdict and denying to plaintiff the result thus fairly gained? There is none. The action of the Circuit Court in setting aside the verdict and awarding a new trial is contrary to well-established law. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385; *Smith v. Ry. Co.*, 48 W. Va. 69, 35 S. E. 834; *Young v. R. R. Co.*, 44 W. Va. 218, 28 S. E. 932; *Miller v. Insurance Co.*, 12 W. Va. 116, and many other cases.

The action of the trial court in setting aside the verdict and awarding a new trial is erroneous. It is therefore reversed. This court now proceeding to render such judgment as the Circuit should have rendered, it is considered that the plaintiff recover from the defendant the sum of \$1,000, with interest thereon from the seventeenth day of April, 1906, and his costs about the prosecution of his case in the Circuit Court expended.

NOTES OF "ACCIDENT POLICY" CASES.

In connection with *BEARD v. INDEMNITY INSURANCE CO.*, (W. Va., March, 1909) 64 S. E. 119, 21 AM. NEG. REP. 371. (preceding case reported) see the following "accident policy" cases:

Accident policy — Proximate cause of death — Struck by bale of hay.

In *GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CO. v. HOMELY*, (*Maryland*, December, 1908) 71 Atl. 524, an action on a policy of insurance, judgment for plaintiff was *affirmed*. The opinion was rendered by SCHMUCKER, J., who stated the case as follows:

"The appellee sued the appellant company in assumpsit in the Superior Court of Baltimore city upon a policy of insurance issued by it upon the life of her son, George H. Gardiner. The verdict and judgment below were in her favor for the full amount of the policy, and the company took the present appeal.

"The policy sued on is of the now familiar class which furnishes indemnity to a designated beneficiary for loss accruing from accidental and external injuries; fatal or otherwise, to the assured. The expressions employed in the earlier part of the policy limit the liability of the company to losses resulting from external accidental agencies "independently of all other causes," but in a later clause of the document a modified liability is distinctly assumed for loss from "injury fatal or otherwise or disability due wholly or in part, directly or indirectly, to disease or bodily infirmity." The portion of the policy providing for that modified responsibility of the company is known as clause 'h,' and is in the following language: 'In event of injury or loss, fatal or otherwise, of which there shall be no external or visible mark on the body, or injury, fatal or otherwise, or disability due wholly or in part directly or indirectly to disease or bodily infirmity, * * * then and in all such cases referred to in this paragraph the limit of the company's liability shall be one-fifth of the amount which would otherwise be payable under this policy anything herein to the contrary notwithstanding.' The declaration in the case before us only avers an insurance against death resulting directly and independently of all other causes from bodily injuries effected through external, violent, and accidental means, but declares upon the policy designating it by its number and date." * * *

"There is evidence in the record tending to show the following state of facts: The assured was an unmarried colored man about forty years of age, who had been employed for more than six years prior to his death at the Warwick stables in Baltimore city. He was a person of unusual strength, in apparently good health, and was uniformly industrious and attentive to his duties. He took an occasional drink of liquor, but was not intemperate in his habits. On Saturday afternoon, October 20, 1906, when he was at work on the ground floor of the stable, a bale of hay was thrown down the hatchway from an upper story of the building, and struck the ground near by him, and then, rebounding, struck him on the back, and knocked him down. He was picked up by his fellow-workman and complained of pain in his back where the hay struck him. He showed his back to one of them, Harrison Hayden, who testified that he saw a bruise there, and rubbed it with liniment. Gardiner remained at the stable the remainder of the afternoon, and wanted to go on with his work, but his comrades would not permit him to do so. After going home on Saturday evening, he never returned to the stable, but, after suffering for some days from acute nephritis accompanied by violent convulsions, died on October 27th." * * *

After reviewing the medical testimony, which was held to be for the jury, the court said:

"It has been held in a number of cases that where the death is from a disease which was itself caused by the accident, the latter is to be regarded as the true and predominant cause of the death, and the disease as a mere link in the chain of causation, and the death is to be regarded as having resulted solely from the accident independently of all other causes. *Freeman v. Mercantile Accident Ins. Co.*, 156 Mass. 351, 30 N. E. 1013; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91; *Fetter v. Fidelity Co.*, 174 Mo. 256, 73 S. W. 592; *Horsfall v. Pac. Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028; *Carey v. Preferred Acc. Ins. Co.*, 127 Wis. 67, 106 N. W. 1055; *Cent. Acc. Ins. Co. v. Rembe*, 220 Ill. 151, 77 N. E. 123; *Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206, and cases collected in note thereto." * * *

Accident policy — Boarding train — Contributory negligence.

In *GARCELON v. COMMERCIAL TRAVELERS' EASTERN ACCIDENT ASSOC.*, (*Massachusetts*, May, 1907) 81 N. E. 201, on report from Superior Court, Suffolk county, judgment was rendered on the verdict for defendant. The facts are stated in the opinion by *SHELDON, J.*, as follows:

"There was at least evidence for the jury that the plaintiff in the loss of his arm suffered a disability caused by external, violent, and accidental means within the meaning of the certificate issued to him by the defendant. He complied with all the requirements of the contract as to notice of injury and proof of claim; and no question is now made of his right to recover in this action, unless one of the defenses set up is shown as matter of law to be fatal to the maintenance of his claim.

"By the terms of the certificate no indemnity is to be paid to any one for an injury caused wholly or in part, directly or indirectly, by voluntary exposure to unnecessary danger, or for any injury which he might have averted or prevented by the exercise of ordinary care, prudence and foresight, or to which his own negligence should have contributed. The circumstances attending the injury are not in dispute. The plaintiff was a commercial traveler and desired to go by a freight train from one town in Nebraska to another. He arrived seasonably at the railroad station, found the freight train there, and put his baggage in the caboose which was the last car of the train. Seeing that the train was not ready to start, he got off the caboose and went along the street a short distance away from the train, and was then returning toward the train when it suddenly started. Believing that the train was proceeding on its journey he ran up to it, and, while it was in motion, started at a point in the street to climb up the iron ladder upon the side of one of the freight cars, intending to reach the top of that car and, by walking upon the top of it and the following cars while the train was in motion, to reach the caboose. As he grasped one of the rounds of that ladder, the train, which was still in motion, gave a sudden and violent jerk, and he was thrown to the ground in such a manner that his left hand and arm extended over one rail of the track and the car wheel passed over it and crushed it, necessitating its amputation." * * *

"In our opinion it is impossible to say that his negligence did not contribute to the happening of the injury. He voluntarily attempted to board a moving train by climbing up the iron ladder on the side of a freight car.

The danger of this was manifest, that he would be shaken off by the jerks of the train; and this happened. He was injured by the very risk that he chose to run. The case is much like *Willard v. Masonic Eq. Acc. Assoc.*, 169 Mass. 288, 47 N. E. 1006, 3 AM. NEG. REP. 667; *Small v. Travelers' Protective Assoc.*, 118 Ga. 900, 45 S. E. 706, and *Alter v. Union Casualty Co.*, 108 Mo. App. 169, 83 S. W. 276. It is governed by the same principles as *Glass v. Masons' Fraternal Acc. Assoc.*, (C. C.) 112 Fed. 495, *Smith v. Preferred Mutual Acc. Assoc.*, 104 Mich. 634, 62 N. W. 990; *Follis v. U. S. Acc. Assoc.*, 94 Iowa, 435, 62 N. W. 807, and *Cornish v. Accident Ins. Co.*, 23 Q. B. D. 453. It is a much stronger case for the defendant than *Overbeck v. Travelers' Ins. Co.*, 94 Mo. App. 453, 68 S. W. 236, which perhaps goes farther than we should be disposed to follow. As in *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 176, this plaintiff voluntarily placed himself in a position where he was exposed to an obvious danger; the precise injury happened to him which there was reason to fear; and it cannot be said that the language of the policy was not intended and understood to be applicable to such a case." * * *

"Nor do we find anything in the situation of the plaintiff which exempts him from the imputation of negligence. He desired to take this train; but he had no right to take it negligently at the risk of the defendant. It was by his own voluntary action that he had left it when he was safely in the caboose. His desire to save time by getting this train cannot excuse him. There was a similar desire to save time in *Glass v. Masons' Fraternal Accident Association*, (C. C.) 112 Fed. 495; *Small v. Travelers' Protective Assoc.*, 118 Ga. 900, 45 S. E. 706, and *Alter v. Union Casualty Co.*, 108 Mo. App. 169, 83 S. W. 276. Nor is the fact that the plaintiff had repeatedly before committed similar acts of negligence, of any assistance to him. In this respect the case is like *Smith v. Aetna Life Ins. Co.*, 185 Mass. 74, 69 N. E. 1059; *Weinschenk v. Aetna Life Ins. Co.*, 183 Mass. 312, 67 N. E. 242; *Piper v. Mercantile Mutual Acc. Assoc.*, 161 Mass. 589, 37 N. E. 759, and *Alter v. Union Casualty Co.*, 108 Mo. App. 169, 83 S. W. 276." * * *

"We have examined all the decisions to which we have been referred by the plaintiff's counsel in their able argument. Most of them are to the point that contributory negligence will not of itself as matter of law prevent a plaintiff from recovering under a policy which stipulates against a recovery for injury caused by 'a voluntary exposure to unnecessary danger,' or requires merely that the insured shall 'use all due diligence for personal safety and protection.' *Badenfeld v. Massachusetts Acc. Assoc.*, 154 Mass. 77, 27 N. E. 769; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Manufacturers' Accident Indemnity Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Duncan v. Preferred Mutual Acc. Assoc.*, 13 N. Y. Supp. 620; *Burkhardt v. Travelers' Ins. Co.*, 102 Pa. St. 262; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896; *Providence Life Ins. Co. v. Martin*, 32 Md. 310; *U. S. Mutual Acc. Assoc. v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544, 3 AM. NEG. REP. 591; *Johnson v. London Guarantee & Accident Co.*, 115 Mich. 86, 72 N. W. 1115; *Hunt v. U. S. Acc. Assoc.*, 109 N. W. 1042; *Rustin v. Standard Life & Acc. Ins. Co.*, 58 Neb. 792, 79 N. W. 712. In *Keene v. New England Acc. Assoc.*, 161 Mass. 149, 36 N. E. 891, the court says, in speaking of such a policy, that "by taking out a policy of insurance against accidents one natu-

rally understands that he is to be indemnified against accident resulting in whole or in part from his own inadvertence." In some of the cases most strongly relied on by the plaintiff, the court adverted to the fact that the policy did not exempt the insurer from liability for accidents caused or contributed to by the negligence of the insured. *Schneider v. Providence Ins. Co.*, 24 Wis. 28; *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111, 54 N. E. 903; *Lovelace v. Travelers' Protective Assoc.*, 126 Mo. 104, 28 S. W. 877. But in the case at bar the express stipulation of the policy is that the defendant shall not be liable for "any injury which the member, by the exercise of ordinary care, prudence and foresight, might have averted or prevented, or to which the member's own negligence shall have contributed." * * *

Accident policy — Injured on track — Voluntary exposure to danger.

In *WHALEN v. PEERLESS CASUALTY CO.*, (*New Hampshire*, June, 1909) 73 Atl. 642, the case is stated by BINGHAM, J., as follows:

"At the time the plaintiff received his injury he held a policy in the defendant company, insuring him against the loss of a foot by complete severance at or above the ankle joint, in the sum of \$100, subject to the proviso that, if the injury resulted 'wholly or in part from voluntary exposure to unnecessary danger or obvious risk of injury,' or resulted from or was received 'while violating the law, or violating the rules of a public carrier affecting the safety of its passengers or the public,' he should be entitled to receive but \$20. The defendant pleaded the exceptions contained in this proviso in defense of the action; and upon the submission of the evidence outlined in the statement of the case, the trial justice directed the jury to return a verdict for the plaintiff for \$20. The parties then agreed that, in case the ruling directing the verdict should be held to be erroneous, judgment should be entered for the plaintiff for \$100, with interest from the date of the writ and taxable costs. In directing the verdict the court ruled as a matter of law that the plaintiff's injury resulted from voluntary exposure to unnecessary danger or obvious risk of injury, or resulted from, or was received while, violating the law, or violating the rules of a public carrier. If any one of these rulings were correct, the verdict should be sustained; otherwise it should be set aside, and a verdict entered in accordance with the agreement of the parties.

"The meaning of the clause 'Voluntary exposure to unnecessary danger, as used in accident policies, has frequently been before the courts. In *Keene v. New England Acc. Assoc.*, 161 Mass. 149, 151, 36 N. E. 891, the language of the exception was 'any voluntary exposure to unnecessary danger, hazard, or perilous adventure,' and it was held that the provision did not contemplate 'an involuntary exposure to unnecessary danger;' that 'a merely inadvertent or unintentional exposure to a danger of this kind is not voluntary, but involuntary. A voluntary exposure * * * implies a conscious intentional exposure — something which one is consciously willing to take the risk of.' In *Burkhardt v. Travelers' Ins. Co.*, 102 Pa. St. 262, it was said: 'A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a voluntary exposure to it. * * * The result of the act does not necessarily determine the motion which prompted the action. The act may be voluntary, yet the exposure in-

voluntary. The danger being unknown, the injury is accidental.' In *Lehman v. Casualty Co.*, 7 App. Div. 424, 429, 39 N. Y. Supp. 912, 915, it was said that 'one cannot be said to be guilty of a voluntary exposure to danger unless he intentionally and consciously assumes the risk of an obvious danger.' In numerous other cases the same conclusion has been reached. It is unnecessary to refer to them at length. See *Badenfeld v. Massachusetts Acc. Assoc.*, 154 Mass. 77, 27 N. E. 769; *Anthony v. Association*, 162 Mass. 354, 357, 38 N. E. 973; *Williams v. Association*, 133 N. Y. 366, 31 N. E. 222; *De Loy v. Insurance Co.*, 171 Pa. St. 1, 32 Atl. 1108; *Equitable, etc., Co. v. Osborn*, 90 Ala. 201, 9 So. 869; *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39. The case of *Cornish v. Accident Ins. Co.*, 23 Q. B. Div. 453, relied upon by the defendant, is not in point. The exception there was of accidents happening 'by exposure of the insured to obvious risk of injury,' not by 'voluntary exposure.' See *Lehman v. Casualty Co.*, *supra*. It appears, therefore, that a voluntary exposure to unnecessary danger or obvious risk, within the meaning of the policy, is a conscious or intentional exposure to a known risk and not a mere inadvertent or accidental one.

"Now the evidence upon this branch of the case tended to show that the plaintiff, when he entered upon the tracks of the railroad was not conscious that he was exposing himself to an unnecessary danger or obvious peril, and that his injury was accidental. He was making use of a path frequented by people in crossing and recrossing the railroad yard. The day was very stormy, with the wind blowing from the northwest. The plaintiff testified that before stepping upon the track he looked and listened, but saw and heard nothing. This evidence was surely not so conclusive that reasonable men must find that the plaintiff consciously and intentionally exposed himself to an unnecessary and obvious danger, and the court erred in withdrawing the question from the jury." * * *

"As it might be found that notices were not posted so as to render people crossing where the plaintiff did liable to prosecution and fine, and that the practice of crossing there was such that the railroad knew, or ought to have known, of it, it might also be found that the plaintiff was not a trespasser, and that in entering upon the right of way he violated no rule of law, civil or criminal. *Keene v. New England Acc. Assoc.*, 161 Mass. 149-151, 36 N. E. 891. The provision in section 1, chapter 75, p. 316, Laws 1899, where it says, 'and no right to enter or be upon any railroad track shall be implied from custom or user, however long continued,' is limited to cases where notice has been posted under the statute forbidding such entry. Since it could be found that the plaintiff in entering upon the tracks of the railroad was not a trespasser, and might have entered with their permission, it could not be ruled as a matter of law that in so entering he was violating a rule of the corporation.

"In accordance with the agreement of the parties there should be judgment for the plaintiff for \$100. All concurred."

Accident policy — Car repairer struck by projecting object while on train — Voluntary exposure to risk.

In *DIDDLE v. CONTINENTAL CASUALTY CO.*, (*West Virginia*, February, 1909) 63 S. E. 962, judgment for plaintiff, whose husband was struck by a railway water column while riding on a railway engine, and killed, was *reversed on*

the ground, among others, that there was a voluntary exposure to obvious risk on the part of the insured. Deceased was insured in defendant's company on an accident policy for \$2,000

The opinion by *POFFENBARGER, J.*, stated the facts as follows:

"The insured was a car repairer in the shops of the Chesapeake & Ohio Railway Company at Huntington. In the evening of the day he was killed, after the completion of his work, he came out of the shop, walked down the railway track in a westerly direction a short distance, passing the water column, standing midway between two railway tracks, about nine feet apart, and stepped on one of two engines drawing a train of cars over a switch from the west-bound track to the east-bound track, as he had often done before. Instead of getting into the cab of the engine, he stood on a step on the outside, holding to a handgrip, while his body projected or swung from the side of it, and was riding in that way, or he was in the act of climbing into the cab, and before he had accomplished it, when the engine came to the water column and his body came into violent contact with it. Lest inaccuracy, frequently incident to attempted generalization, may have crept into the preceding sentence, we quote the testimony, detailing the circumstances of the accident. *W. F. Adkins*, a workman in the shop, said: "Well, the first place that I saw *Mr. Diddle*, or, they told me afterwards it was *Mr. Diddle* — I did not know the gentleman at the time — he was between the north, no, the west, bound track and the east-bound track of the Chesapeake & Ohio, this side, that is, on the south side of the Huntington shops. He got on the engine, double-head, as we say. I suppose you gentlemen know what is meant by double-head, running two engines together. Well he got on the first engine and was climbing upon the tank, between the engine and the tank; and the water column with the water, where the engines take on water, struck him in the back of the head and knocked him off, struck him and he rolled just past the post and fell, and the main rod of the second engine crushed his head against the ground, which caused his death." On cross-examination he said the deceased had boarded the engine about sixty feet from the water column. He had put one foot on the first step and raised the other to place it on the next one. He was looking back, supposedly to see other men climb on. When struck, he had had time enough, in the opinion of the witness, to have gotten into the cab if he had not stopped to look back. He was holding to the hanger on the tender and leaning out so that the water column, twenty or twenty-four inches from the engine, struck him. *Charles R. Wilson*, chief clerk at the railway shops, said: "Well, the shop whistle had blown, and about 5:40 I was coming out of the gate, preparatory to catching a street car to come home. There was a train, a freight train, coming along, a double-header, and I stopped to permit it to pass. Looking down the track, I saw a man lying on the ground, just as if he had fallen. I saw him fall, and the rod came over and struck him in the head, and his feet flew up and nearly touched the train, and he dropped down and was dead. Before I went to where the man was lying, I stepped across over in front of the train and signaled the engineer to stop, and then went back in front of the engine and on around where the man lay." Witnesses say there was a rule of the railway company forbidding employees from boarding moving trains and riding on them to and from their work, but, since the passage of the statute making it unlawful to jump on moving trains, the rule

had not been insisted upon. As a matter of fact, the employees did frequently, if not generally, board moving engines and trains at or near the shops just as the deceased did on this occasion. There were others on the same engine at the time he was hurt. The train was moving at the rate of about ten miles an hour when he boarded it. As to some of these matters there may be some contradiction in the testimony, but none, it is believed, as to the more material facts.

"While the case is one of first impression in this State, the clause in question is, and has been, in general use by insurance companies for a long time, and its construction is thoroughly settled by numerous decisions in other jurisdictions. A voluntary exposure to necessary danger is not forbidden by it. *Keene v. New England Acc. Assoc.*, 161 Mass. 149, 36 N. E. 891. A merely inadvertent and unintentional exposure to a known danger, under peculiar circumstances, not affording opportunity for deliberate action, is an involuntary, not voluntary, exposure. *Keene v. Accident Assoc.*, cited; *Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896; *Insurance Co. v. Osborn*, 90 Ala. 201, 9 So. 869. Exposure to an unknown danger, though a voluntary act, is not a voluntary exposure. *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39; *Carpenter v. Accident Co.*, 46 S. C. 541, 24 S. E. 500; *Johnson v. Accident Co.*, 115 Mich. 86, 72 N. W. 1115; *Burkhard v. Insurance Co.*, 102 Pa. St. 262; *De Loy v. Insurance Co.*, 171 Pa. St. 1, 32 Atl. 1108. Either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent person ought to have known it at the time of encountering it, is universally held to be voluntary exposure within the meaning of this clause. *Garcelon v. Accident Assoc.*, 195 Mass. 531, 81 N. E. 201; *Willard v. Masonic Eq. Acc. Assoc.*, 169 Mass. 288, 3 Am. Neg. Rep. 667, 47 N. E. 1006; *Smith v. Insurance Co.*, 185 Mass. 74, 69 N. E. 1059; *Conboy v. Accident Assoc.*, 43 N. E. (Ind. App.) 1017; *Insurance Co. v. Jones*, 80 Ga. 541, 7 S. E. 83; *Tuttle v. Insurance Co.*, 134 Mass. 175; *Rebman v. Insurance Co.*, 217 Pa. St. 518, 66 Atl. 859; *Alter v. Cas. & Sur. Co.*, 108 Mo. App. 160, 83 S. W. 276; *Follis v. Accident Assoc.*, 94 Iowa, 435, 62 N. W. 807; *Cornish v. Insurance Co.*, 23 L. R. Q. B. D. 453. These decisions emphasize the duty of exercising some degree of care and prudence, in view of obvious danger, even though the insured did not at the moment of injury realize it, or was not actually conscious of it, as well as that of avoiding known danger by the exercise of prudence and care, and deny to the beneficiary of the policy the right to take the opinion of the jury as to whether the insured was actually conscious of it, at the moment of the injury or of the action from which it resulted. They proceed upon that principle of the law which estops a man from saying he did not see or hear that which he must have seen or heard, if he had given his action and the surrounding circumstances that degree of attention which prudence and a due regard for his own safety and the rights of others require. This court has frequently applied it in negligence cases. *Slaughter v. Huntington*, (W. Va.) 61 S. E. 155; *Riedel v. Traction Co.*, 63 W. Va. 522, 61 S. E. 821; *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211; *Mocre v. Huntington*, 31 W. Va. 849, 8 S. E. 512; *Phillips v. County Court*, 31 W. Va. 480, 7 S. E. 427. While the rights of the parties here are governed by the contract, and not by the legal

rules and principles of the law of negligence, there are certain general principles common to many branches of the law, and operative in the determination of the rights of parties, whether they arise *ex contractu* or *ex delicto*. Though, perchance, the insured may recover on a policy of this kind, when the circumstances would deny relief under the law of negligence, since this clause does not contemplate such exposure as is incident to the ordinary habits and customs of life (*Accident Ind. Co. v. Doigan*, 58 Fed. 945, 7 C. C. A. 581), it is nevertheless well settled that he must exercise at least ordinary care, and failure to do so is negligence in a case, determined by the law of negligence." * * *

The syllabus by the court states the points decided as follows:

"1. Either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent man would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof, is a 'voluntary exposure' within the meaning of a clause in an accident insurance policy limiting the liability of the insurer in case of an injury resulting from 'voluntary exposure to unnecessary danger or obvious risk of injury.'

"2. Unconsciousness of the danger at the moment of injury does not excuse the insured, except in those instances in which he was ignorant of the danger and under no duty, from the obviousness thereof, to know its existence.

"3. If the danger is obvious, and there is nothing in the situation of the insured or the circumstances surrounding him that in any way precludes deliberation, freedom of action, or choice of conduct, such as a sudden peril, which he had no reason to expect, or the like, and he encounters it, and is injured, the exposure is 'voluntary.'

"4. In an issue raised under such a clause, the rights of the parties are fixed and determined by the contract, not the law of negligence; but certain general principles, operative alike in controversies arising *ex contractu* and *ex delicto*, have application, and of these some are recognized in the law of negligence.

"5. Penal statutes are strictly construed.

"6. Section 4282, Code 1906, making it criminal for persons, not passengers or employees of railroads, to jump on or off of railway engines, cars, or trains, does not inhibit such conduct in an employee of a railroad company, whose duties are confined to work in its shops, and do not require him to go upon or about its engines, cars, or trains when in use on its tracks or yards.

"7. On a motion therefor a trial court should direct a verdict, when the evidence is insufficient to sustain one different from that which the court is asked to direct.

"8. An instruction not founded upon evidence — that is, one embodying a proposition the evidence does not tend in an appreciable degree to support — should not be given.

"9. In an action on a policy of insurance, in which the defense is predicated on a clause limiting liability, when the injury has resulted from voluntary exposure to unnecessary danger or obvious risk, instructions, ignoring many important facts, disclosed by the evidence, and telling the jury they may find for the defendant, if they believe the insured

did certain isolated acts, which would not in themselves, under all circumstances, make out, in law, a good defense under such a clause, are properly refused."

Accident policy — Run over by train — Intoxication.

BAKALARS v. CONTINENTAL CASUALTY CO., (*Wisconsin*, October, 1909) 122 N. W. 721, was an action on policy for accidental death of John Bakalars on December 7, 1905, whose body was found shortly after one o'clock in the morning beside a railroad track. Death by one of the causes insured against was not contested, but the defendant set up, first, that it occurred from "the voluntary exposure of said Bakalars to unnecessary danger and obvious risk and injury; and, second, while said Bakalars was "under the influence of intoxicating liquors," in each of which cases the policy provided that only one-tenth of the face thereof should be paid. This amount was tendered. The court submitted but one question to the jury, namely, whether Bakalars at the time he sustained the actual injury was under the influence of any intoxicant, which was answered in the negative. Whereupon judgment for the face of the policy was rendered, from which the defendant appeals. Judgment in the Circuit Court, La Crosse county, was *affirmed*, the case being stated in the opinion by DODGE, J., as follows:

"1. The first error assigned is upon refusal to submit to the jury the question whether the injury resulted 'from voluntary exposure to unnecessary danger or obvious risk of injury.' According to the great weight of authority, three elements are essential to this excuse from liability: (a) Conscious knowledge of the danger; (b) intentional or wilful exposure to it; and (c) that the danger shall be unnecessary. As to the first two elements, this court has declared itself in accord with such authority in *Schneider v. Providence Life Ins. Co.*, 24 Wis. 28; *Shevlin v. The American Mutual Acc. Assoc.*, 94 Wis. 180, 68 N. W. 866, and in *Sargent v. Central Acc. Ins. Co.*, 112 Wis. 29, 87 N. W. 796. The only evidence upon which the court or jury could act was that the deceased was a locomotive fireman insured as such, whose duties, of course, took him about the tracks in railroad yards, and that on the occasion in question he took an entirely usual route, and the shortest one, from his home to his place of employment at the roundhouse through the railroad yard, and in the vicinity of tracks, and that his injuries indicated that he had been struck and run over by a passing engine. In the absence of any other evidence, we agree with the trial court that a conclusion either that he knew of the danger from which he suffered, or that he wilfully and intentionally exposed himself to it, could have been based only on conjecture or guess. The burden of proof was upon the defendant to offer evidence from which such conclusion might result by reasonable inference, and not alone by conjecture. *Follis v. Insurance Co.*, 94 Iowa, 435, 62 N. W. 807; *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36; *Hyer v. City of Janesville*, 101 Wis. 371, 5 Am. Neg. Rep. 268, 77 N. W. 729; *Schell v. Railway Co.*, 134 Wis. 142, 113 N. W. 657. The trial court did not err in holding that no such evidence had been introduced, and therefore an affirmative answer to such question could not have been sustained.

"2. A second error is assigned upon the refusal of the court to direct verdict that the deceased at the time of his injury was under the influence of intoxicating liquor, which fact it is claimed was established without dispute. We cannot at all agree with this view of appellant's counsel. The evidence of any considerable use of intoxicating liquor, or influence thereof upon deceased even at any time during the evening before his death, is very conflicting; but, even if a condition of some degree of intoxication had existed, there was evidence tending to show that the last use of liquor was prior to ten o'clock; that an hour or more of slumber succeeded it, and that as early as an hour before the casualty, on awakening from that slumber, deceased had fully recovered all his faculties, and was free from any apparent influence of previous potations. We agree with the trial court that there was plenary evidence on which jury might have based a negative answer to the question submitted to them.

"3. Error is assigned upon instructions substantially to the effect that the phrase in the policy 'under the influence of any intoxicant' meant not every and any influence however slight, but such degree of influence as would materially impair the deceased's ability to care for himself and guard against casualties, and that such degree of influence was equivalent to intoxication in the ordinary meaning of that word; that the jury should not answer the question in the affirmative unless they found that he was 'intoxicated' or 'drunk.' The entire phrase of the policy in which these words occur is 'where the accidental injury is sustained while the assured is insane, delirious, or under the influence of any intoxicant or narcotic.' The rule, of course, is thoroughly established that in case of ambiguity the words of an insurance policy are to be read most favorably to the insured. Here the intimate association of the words 'under the influence of intoxicants' with the words 'insane or delirious' at once suggests that the influence of intoxicants intended to be described has some similarity in character with insanity or delirium. Again, it must be presumed that this provision is included in the policy for some practical purpose, and that, therefore, it is intended to describe a condition which at least might enhance or affect the insurer's liability. The 'influence of intoxicants' is a very elastic term. We are told by physicians and experimenters that the most trifling quantity of alcohol has some effect, and that its effect persists for days, if not permanently, so that one is literally under the influence from a single ordinary portion. We know as a matter of common knowledge that one of the first influences may be to stimulate those very faculties of observation and alertness which would improve the capacity of the subject to shield himself from danger, or escape, and that some such degree of influence of an intoxicant would not in any respect increase the peril of injury. It is therefore a natural and almost necessary assumption that these words were not inserted in the policy for the purpose of depriving the assured of the benefit thereof in case of every and any influence of intoxicating liquors, however slight and however nonprejudicial to the insurer. The field, therefore, is open for construction to ascertain just what degree or kind of influence is referred to. As already said, we must presume that it means such and so much influence as impairs the ability of the subject to care for himself, and thus increases the probability of his suffering accidental injury. In

light of such reasoning it has been decided by all courts speaking upon the subject that influence of intoxicants in accidental policies means the same thing as the word 'intoxication.' 3 Joyce, Ins., § 2612; Standard Ins. Co. v. Jones, 94 Ala. 434, 10 So. 530; Campbell v. Fidelity Ins. Co., 109 Ky. 661, 60 S. W. 492; Jones v. Acc. Assoc., 92 Iowa, 654, 61 N. W. 485; Prader v. Acc. Assoc., 95 Iowa, 149, 63 N. W. 601. In this field of indefiniteness it is important that some exact line should be adopted by which the rights of parties are rendered certain, and, in absence of any cogent reasons to the contrary, we deem it wise and justifiable to adopt this line of demarcation which has been approved by express decision of other courts, especially since such decisions preceded the date of this contract, and may reasonably be presumed to have been in mind when its phraseology was adopted. We conclude that the instruction was substantially correct.

"4. Refusal of certain requested instructions is assigned as error. They assumed a state of intoxication at some time during the evening prior to the death of insured. Since, as we have said, this fact was in dispute, the requests were improper in form, and no error was involved in their refusal. Judgment affirmed."

Accident policy — Passenger elevator — Single and double indemnity.

In *DEPUE v. TRAVELERS' INSURANCE CO.*, (U. S. C. C., E. D. Pennsylvania, January, 1909) 166 Fed. 183, an action to recover on an accident policy which agreed to pay plaintiff a certain sum of money if his mother should lose her life as the result of "bodily injuries effected directly and independently of all other causes, through external, violent and accidental means * * * while in a passenger elevator," judgment for \$5,000 was affirmed. The facts which were not disputed are stated in the brief of counsel for defendant as follows:

"The elevator was standing at the first floor of a building with the door, which extended to the roof of the elevator, wide open. The elevator attendant was not in the elevator, but attending to some duties elsewhere. The elevator had for its operation a small lever on the side wall to the right as one entered the door. While the elevator was stationary, this lever was in the centre of its arc of operation. In order to start the elevator, it was necessary to push down a button at the centre of the arc, which enabled the operator to move the lever, and then to move the lever either to the right or to the left. The elevator was in perfect condition before the accident, and was found to be in perfect condition after the accident. It continued to be used without repairs. No one saw the accident itself. Attracted by a noise, the superintendent of the building went to the elevator and found the insured hanging head downward into the elevator, her body caught between the roof of the elevator and the floor of the building. One leg, which had been caught at the thigh, was projecting over the floor. The superintendent released the elevator, whereupon the insured fell into the elevator and upon the floor."

Defendant denied that the injuries were inflicted "in a passenger elevator."

The opinion was rendered by J. B. McPHERSON, District Judge, who dis-

cussed the case at length, citing and quoting numerous authorities on the question of single and double indemnity. BURR, BROWN & LLOYD appeared for plaintiff; FRANK P. PRITCHARD, for defendant.

The points decided are stated in the syllabus to the report in 166 Fed. 183, as follows:

"1. An elevator was standing at the first floor of a building, with the door, which extended to the roof of the elevator, wide open, the attendant being elsewhere. The car was operated by a lever on the side wall to the right of one entering the door, and, while the elevator was stationary, this lever was in the centre of its arc of operation. In order to start the elevator it was necessary to push down a button at the centre of the arc, which permitted the movement of the lever to the right or left. The elevator was in perfect condition, both before and after the accident, which no one saw. The building superintendent found insured hanging head downward into the elevator, her body caught between the roof of the elevator and the floor of the building. One limb which had been caught at the thigh was projecting over the floor. When the elevator was released, insured fell into it on its floor. *Held*, that insured was 'in' the elevator when the injuries were inflicted, within a policy insuring against accidental injury while 'in' a passenger elevator.

"2. An accident policy insured D. according to a schedule providing that the principal sum for the year was \$5,000, with five per cent. increase annually for ten years (afterwards changed to ten per cent. annually for five years) until it amounts to \$7,500, each consecutive full year's renewal to add five per cent. (afterwards ten per cent.) to the principal sum of the first year, until such additions shall amount to fifty per cent., and thenceforth, so long as the policy is in force, the insurance shall be for the original sums plus the accumulations. Attached to the policy was a rider insuring H. 'as specified in the following schedule' to the amount of the original principal sum of the policy to which the supplement was attached. *Held*, that the limit of indemnity recoverable for the accidental death of H. was \$5,000.

"3. A provision of an accident policy that no action thereon shall be brought until three months after receipt of proofs of death at the home office of the company is waived by the insurer's denial of liability."

KILEY v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. (1).

Supreme Court, Wisconsin, January Term, 1909.

FLYING OBJECT — RAILROAD EMPLOYEE STRUCK BY PIECE OF METAL — NEGLIGENCE OF FELLOW-SERVANT — LIABILITY OF RAILROAD COMPANY — STATUTE. — Plaintiff, an employee of defendant, was engaged with other employees of defendant, in the construction of a wire fence along defendant's

1. Rehearing in the Kiley case, March 9, 1909.

right of way. Defendant's foreman directed the workmen to take certain wire off an old fence, which wire was held in place by staples. Plaintiff was advancing toward a fence post with a hammer, intending to pull out the staples, when a staple was pulled out of the post by two other employees, and the staple flying into the air struck plaintiff in the eye. Action was brought under Laws of 1907, c. 254, p. 495, which imposes liability upon railroad companies for injuries to railroad employees caused by negligence of fellow-servants (except employees working in shops and offices). Defendant demurred to the complaint. *Held*, that the complaint stated a cause of action under said statute, and demurrer was overruled (2).

CONSTITUTIONAL LAW — STATUTE — VALIDITY — RAILROAD COMPANY — RAILROAD EMPLOYEES — SPECIAL REGULATION — FELLOW-SERVANT — NEGLIGENCE OF RAILROAD EMPLOYEES — LIABILITY OF RAILROAD COMPANY. — The opinion of the court (per SIEBECKER, J.) discussed the constitutionality of the statute, Laws 1907, c. 254, p. 495, imposing liability upon railroad companies for injuries to railroad employees caused by negligence of fellow-servants (excepting employees working in shops and offices) and *held*, that the same was valid (3).

MARSHALL, J., *dissented*.

2. See also *TOWLER v. N. J. ADAMANT MFG. CO.*, (N. J. Sup.) 74 Atl. 279, 21 AM. NEG. REP. 214, *ante*, and notes of recent cases arising out of injuries sustained by being struck by flying objects. Reported in this volume of Reports, pp. 215-221, *ante*.

3. *Constitutional law — Statute — Master and servant — Special regulation of relations — Railroad company — Fellow-servant rule — Negligence of railroad employees — Liability of railroad company — Validity of statute.*

The syllabus to the official report in the Kiley case, (138 Wis. 215) states the points decided on constitutional law, with especial reference to the statute, Laws 1907, c. 254, p. 495, imposing liability upon railroad companies for injuries to railroad employees caused by negligence of fellow-servants (except employees working in shops and offices) as follows:

"1. Corporations are entitled to the same protection as individuals

under the constitutional guaranties of liberty and equality, and are "persons" within the meaning of the Fourteenth Amendment, Const. of U. S., providing that no State shall deprive any person of property without due process of law or deny to any person the equal protection of the laws.

"2. The rule of equality before the law does not preclude classification for legislative purposes, if the classification is not arbitrary but is based upon substantial distinctions, is germane to the purpose of the law, is not based on existing circumstances only so that there can be no change in the membership of a class, and provided the law applies equally to all members of each class.

"3. The necessity and propriety of such classification are to be determined by the legislature and if made in conformity with the rules above mentioned it cannot be disturbed by the courts.

"4. The business of operating a

APPEAL from an order of the Circuit Court for Brown County. S. D. Hastings, Circuit Judge. *Order affirmed.*

Plaintiff brings this action for the recovery of the damages alleged to have been suffered by reason of the loss of an eye and the physician's and nursing bills incurred as the result of an injury which he claims was due to the negligent and careless manner in which other employees of the defendant performed their duties. On July 2, 1907, plaintiff was engaged with other employees of the defendant in the construction of a wire fence along the defendant's right of way. The company's foreman had directed them to take certain wire off an old fence. The wire was held in place by staples and these were to be pulled out. Plaintiff was advancing toward a fence post with a hammer, intending to pull out the staples, when two of the other employees, by pulling upon the wire, pulled a staple out of the post. The staple flew into the air, struck plaintiff in his right eye, and blinded him. The action is brought under Laws of 1907, c. 254. The court overruled defendant's demurrer to the complaint.

railroad differs from others in its nature in its relation to the public, and in its peculiar dangers to employees and to the public, so as to justify special regulations, and to that end the separation of railroad companies into a class for purposes of legislation having for its object the protection of their employees and the safety of the public.

"5. Laws of 1907, c. 254, amending section 1816, Statutes (1898), and imposing upon every railroad company liability for all injuries sustained by any employee thereof (except employees working in shops and offices) while engaged in the line of his duty as such caused in whole or in greater part by negligence of any other employee of such company—is designed to enforce greater care on the part of the companies in the selection of employees and thereby to secure not only protection for the employees but the safety of the public, and is not invalid under the constitutional guaranties as to due process of law and equal protection of the laws.

"6. It is not essential to the validity of such legislation that its operation should be confined to employees actually engaged in operating trains, or incurring risks peculiar to the railroad business—the special regulation having reference to railroad companies as a class, and not necessarily to any particular class of employees.

"7. Office and shop employees of railroad companies are sufficiently distinct in their employment and relation to the conduct of the business to justify the legislature, within the field of its discretion and with regard to public policy, in exempting them from the operation of the law.

"8. Subdivision 5 of said section 1816, Statutes, as amended by c. 254, Laws of 1907 (providing that 'in all cases under this Act the question of negligence and contributory negligence shall be for the jury') is merely declaratory of the law as it existed, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence it is for the jury

This is an appeal from the order of the court overruling the demurrer and allowing the defendant to answer within twenty days upon the usual terms.

H. O. FAIRCHILD (BURTON HANSON, of counsel), for appellant.

MINAHAN & MINAHAN (V. I. MINAHAN, of counsel), for respondent.

SIEBECKER, J. (Opinion filed January 5, 1909). — Plaintiff's right to recover on the alleged cause of action is founded on the provisions of section 1816, St. 1898, as amended by chapter 254, p. 495, Laws 1907. There is no claim that the facts alleged in his complaint constitute a cause of action against the defendant at common law, or under section 1816, St. 1898, as it stood prior to its amendment by chapter 254, p. 485, Laws 1907. The lower court sustained the complaint upon the ground that section 1816, St. 1898, in its amended form is valid. The defendant avers that the amended statute creates liabilities and imposes burdens which are forbidden by sections 1, 9, 22, art. 1, of the State Constitution, and by the Fourteenth Amendment of the Federal Constitution. The alleged obnoxious provisions of the statute were added by the Amendatory

to determine from the evidence adduced whether negligence or contributory negligence in fact existed. It does not, therefore, deprive the courts of any judicial power vested in them by the Constitution (art. VII., sec. 2).

"9. Even if said subdivision 5 were construed as conferring judicial power upon juries its invalidity would not render the other portions of the Act invalid, it being a separate and distinct provision, not the compensation for or inducement to the enactment of such other portions.

"10. Subdivisions 3, 4, of said section 1816 (providing, in effect, that contributory negligence of the injured employee shall be no bar to a recovery if the negligence of the company or other employee contributed in a greater degree to the injury) are within the legislative power of police regulation, and cannot be held so arbitrary and unreasonable as to be invalid under the constitu-

tional guaranties of equal protection and due process of law.

"11. Subdivision 6 of said section 1816 (providing that no contract, rule, or regulation shall exempt a railroad company from the full liability imposed by the Act) is a proper provision within the discretion of the legislature, to secure to employees the benefits of the rights created, and does not unduly infringe the company's right to liberty of contract.

"12. Subdivision 8 of said section 1816 (which seeks to extend the rights and liabilities created by the Act to cases where the injuries were received in another State if the contract of employment was made in this State) deals with a subject independent of and severable from the other parts of the Act, and if invalid does not render the whole law invalid.

Whether said subdivision 8 of said section 1816 is invalid or not is not determined. MARSHALL, J., *dissenting*.)

Act, which is embraced in chapter 254, p. 495, Laws 1907. It is therefore contended, if this Act is invalid, that the provisions of section 1816, St. 1898, as it stood prior to such amendment, are still in force as the law on the subject. The provisions of chapter 254, p. 495, Laws 1907, are assailed as invalid legislation upon several grounds (4).

It is first contended that the enacting part of this chapter and subdivisions 1, 2, and 9 must be read together, and that when so considered the Act is unconstitutional because it denies to railroad companies equal protection and due process of law. These provisions are:

"Every railroad company shall be liable for damages for all injuries, whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee."

"1. When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery or appliance used by its employees in and about the business of their employment.

"2. When such injury shall have been sustained by an officer, agent, servant or employee of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employee of such company in the discharge of, or by reason of failure to discharge his duty as such."

"9. The provisions of this Act shall not apply to employees in shops and offices."

There is no controversy raised as to the rights of persons under the provisions of the State and Federal Constitutions guaranteeing to all persons the equal protection and due process of law. It is, however, contended that the Legislature had no power to impose on railroad corporations only the burdens and liabilities embraced in this statute and thus to exempt all other corporations, persons, and associations from these burdens and liabilities. Appellant's chief contention is that this legislation is discriminatory against railroad companies, and violates both the State and Federal Constitutions forbidding arbitrary and special legislation, and the constitutional guaranties of due process and equal protection of the laws. It is said that corporations are entitled to the rights of a person within

4. Compare *Hoxie v. N. Y., N. H. & H. R. Co.*, (Conn.) 73 Atl. 754, reported in this volume of AM. NEG. REP., p. 42, *ante*, on the constitution-

ality of the Federal Act relating to liability of railroad companies for injuries to employees caused by negligence of fellow-servants.

these constitutional guaranties of liberty and equality, and that they are afforded the same protection as individuals against an invasion of these rights. They must be granted equal means and equal access to the courts for the protection of their rights, and the imposition of burdens, liabilities, and charges which are not imposed on all others under the same circumstances is forbidden. These rights of corporations were recently recognized in the case of *Phipps v. Wis. Cent. R. Co.*, 133 Wis. 153, 113 N. W. 456. As declared in the opinion of the court in *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 592, 17 Sup. Ct. 203. "It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws" [citing cases].

Since then, the railroad company, which is the defendant, under these constitutional provisions is protected as an individual in its rights, the question recurs: Do the provisions of chapter 254, p. 495, Laws 1907, violate these rights? As this court stated in the *Phipps Case*, *supra*: "When by statute a person, natural or artificial, is denied an equal remedy in the law or equal protection in the courts such statute is void (citing). To this broad rule of equality of all persons before the law is the exception of the right under certain circumstances of proper classification, but this classification must be reasonable, and based upon certain rules which bear a just relation to the act in respect to which the classification is made (citing)." That such classification must be based upon substantial distinctions, be germane to the purpose, cannot rest on existing circumstances only, nor preclude additions to those included in the class, and must apply equally to all within, received full elaboration in that case, and the cases there collated, and need not be repeated here. The power of classification for legislative purposes has existed at all times as an incident of legislative power, and exists now unless expressly forbidden by the Constitution. It is also well recognized that the necessity and propriety of such classification are to be determined by the legislative branch of the government, and cannot be disturbed when exercised within the limitations imposed. We must then determine whether the Legislature by this legislation has violated accepted rules of classification.

The statute imposes liabilities on railroad companies for all injuries sustained by any of its officers, agents, servants, or employees, while in the performance of their duties, which may be caused, in whole or in greater part, by the negligence of other officers, agents, servants, or employees, those working in shops and offices being

excepted. It is strenuously urged that the imposition of these burdens and liabilities, on railroad companies only as a class, violates their right to the equal protection of the law, and that, being a classification based upon the character of the corporation, it furnishes no reasonable distinction or necessity for separating them into a class for purpose of legislation. To ascertain wherein distinction is made by the Legislature between railroad companies and individuals and other corporations and associations we must consider the nature and object of the regulation, as well as the provisions prescribing rules for the regulation of railroad companies as a class. The context of this statute shows that railroad companies are separated into a class for legislative regulation respecting their liability to their employees for injuries caused by its negligence or the negligence of other employees in the course of their employment. Is the railroad business distinguished in character from all other business so as to justify special regulation of it, as is done by this law? This we think must be answered in the affirmative. The business of operating a railroad differs from others in its nature, in its relation to the public, and in the peculiar dangers and hazards as regards its employees and the public. These characteristics clearly distinguish the railroad from any other business, and call for regulation to meet the conditions and exigencies peculiar to it, and such as are wholly inapplicable to any other business. The object of this law is to attain reasonable protection to its employees, and to secure the safety of the public. The Legislature seeks to attain this through the imposition of these unusual burdens and liabilities, thereby securing from railroad companies the exercise of a degree of care, in the selection of competent and careful employees for the conduct of the business, commensurate with the hazards and dangers to its employees and the insecurity of the public. Securing the safety of the public in addition to the protection of its employees, is an important feature which distinguishes a railroad business from any other and is an important consideration in separating railroads into a class by themselves for legislative purposes. The following cases, selected from many others, are authorities holding statutes, similar to that contained in chapter 254, p. 495, Laws 1907, valid within the provisions of the State and Federal Constitutions guaranteeing equal protection and due process of law:

In the case of *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161 (15 Am Neg. Cas. 96-98), the court considered a Kansas statute, which enacted that: "Every railroad company,
* * * shall be liable for all damages done to any employee of

such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage." In considering the claim that it was unconstitutional legislation, the court says: "It (the claim) seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be farther from the fact. The greater part of all legislation is special either in the objects sought to be attained by it, or in the extent of its applications. * * * And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. * * * It is conceded that corporations are persons within the meaning of the amendment (citing). But the hazardous character of the business of operating a railroad would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufacturing."

In *Tullis v. L. E. & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, the court had under consideration the validity of an Act of the Indiana Legislature providing that railroad companies should be liable for injuries to their employees resulting from the negligence of fellow-servants. The provisions of the Act extended to the same class of railroad employees as the Act now before us, and was attacked in the Federal court upon similar grounds, but the court held that it was proper to treat railroads as a class by themselves for the purposes of such regulation, and that it was a valid enactment, reaffirming the doctrine of the *Mackey* and other cases upholding similar statutes of the States of Iowa and Ohio. See *Minn. & St. L. R. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176; *Chicago, K. & W. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585; *Peirce v. Van Dusen*, 47 U. S. App. 339, 78 Fed. 693, 24 C. C. A. 280.

Recurring to this class of legislation in our State, we find the first

enactment was embodied in chapter 173, p. 293, Laws 1875, under which railroad companies were made liable "for all damages sustained within this State by any employee, servant or agent of such company while in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other agent, employee or servant," and that no contract, receipt, rule, or regulation should exempt the company from such liability. In the case of *Ditberner v. Ry. Co.*, 47 Wis. 138, 2 N. W. 69, this court held that this statute was not obnoxious to the constitutional provision prohibiting unequal and partial legislation on general subjects. The court expressly rejects the views expressed in the opinion of the Iowa court (*Deppe v. C., R. I. & P. Ry. Co.*, 36 Iowa 52, 14 Am. Neg. Cas. 632), respecting the proper basis of classification, and sustains the law, though it found that it was not restricted in its operation to such injuries as were sustained from the negligent operation of railway trains. The court there rejected the holding of the Iowa court which so restricted the application of the statute. In the light of this declaration we do not deem it necessary to further consider the Iowa case as an authoritative construction of our early statute.

It is contended that the true basis of classification is the one declared by the court in *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974, 16 Am. Neg. Cas. 339, which in effect, declares that the reason for treating railroad companies as a separate class for regulations of the nature of those embraced in the law under consideration is based on the peculiar hazards to employees incident to "the use and operation of railroads," and that it is restricted to those whose injuries are "the result of such dangers." *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. 156, 16 Am. Neg. Cas. 339. As we have shown, the ground for classifying railroads separately for the purpose of such legislation is not only to protect the employees against the peculiar dangers and hazards incident to the operation of the railroad, but also the security of the public.

The exemption of shop and office employees from the operation of the law seems an appropriate one, because they are not engaged in that part of the business which exposes them to unusual dangers and hazards of the business; nor does their conduct bear so directly in securing the safety of the public. It is suggested that this exemption is improper because these employees may be subjected to hazards or peril equally dangerous to those to which other employees are subjected. Conceding that this may be true, still that would not invalidate the classification. We do not find the legisla-

tive power to classify confined within such narrow limits. As declared by this court in *State v. Evans*, 130 Wis. 381, 110 N. W. 241: "Each new exercise of the power of police regulation presents anew to the courts the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation. As to the cogency or propriety of either the regulations made or of the importance of the distinctions * * * the courts have little concern. Those subjects rest with the Legislature, and only when the court * * * is compelled to say that no one, in the exercise of human reason and discretion, could honestly reach a conclusion that distinctions exist having any relation to the purposes and policy of the legislation can it deny its validity (citing)." Nor are distinctions between individuals of one class and of another the criteria merely of a classification. "The question to be considered, however, is the distinction between the classes as classes, whether they are characteristics, which in a greater degree persist through the one class than in the other, which justify legal discrimination between them (citing)." We are of opinion that the office and shop employees are sufficiently distinct in their employment and relation to the conduct of the railroad business to justify the Legislature, within the field of its discretion, and with regard to public policy, in exempting them from the operation of the law. *C., K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585; *Minn. & St. L. R. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176; *Callahan v. St. Louis, etc., Co.*, 170 Mo. 473, 71 S. W. 208; *Pittsburg, etc., Ry. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582; *Ga. R. R. & B. Co. v. Miller*, 90 Ga. 571, 14 Am. Neg. Cas. 234, 16 S. E. 939; *Atch., T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609; *Employers' Liability Cases*, 207 U. S. 463; (*Howard v. Ill. Cent. Ry. Co.*, 207 U. S. 463, 28 Sup. Ct. 141).

It is contended that the Legislature intended to deprive the courts of their judicial functions, as conferred on them by section 2, art. 7, of the State Constitution, by the provisions of subdivision 5. and to confer such functions on juries, as they are constituted by the State Constitution. The powers conferred on courts and juries by these constitutional provisions were well defined in the established system of jurisprudence in this country at the time of their adoption. This court interpreted these constitutional provisions as conferring on court and jury those well-defined powers as they existed, and had been repeatedly exercised by court and jury, under the common law. In *Callanan v. Judd*, 23 Wis. 243, in speaking of the significance of the phrase "Judicial power as to matters of law and

equity," employed in the Constitution, as applied to the courts, the court declares: "In actions at law they had the power of determining questions of law, and were required to submit questions of fact to a jury. When the Constitution, therefore, vested in certain courts judicial power in matters at law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the Constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood." See, also, *Oatman v. Bond* 15 Wis. 21; *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112; *City of Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128. Under the system of law as it then existed it devolved on the court to determine the legal sufficiency of the evidence tending to prove the fact; and, when the court had judicially ascertained that the evidence adduced tended to establish the constituent facts of the matter at issue, it then devolved on the jury to determine whether, upon the evidence, the fact was satisfactorily proven. The powers of the court and jury in the administration of the law in these respects were distinct and well defined at the time of the adoption of our Constitution and became vested in the court and jury by its provisions. They cannot be abrogated or modified by legislative action (to the extent of impairing, in any degree, the judicial power). Under the Constitution courts have become vested with the judicial power to determine the question of the legal sufficiency of the evidence to establish the rights of the parties at issue, and to apply the law to the facts when found, and this power cannot be withdrawn from them and conferred on juries.

Did the Legislature intend by the provisions of subdivision 5 of this Act to confer judicial power, vested in the court, on the jury? It declares: "In all cases under this Act the question of negligence and contributory negligence shall be for the jury." In their general sense the words are but a declaration of the law as it exists, namely, that when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence adduced whether negligence or contributory negligence exists. This interpretation of the provision does not make a change in the law, and cannot affect the rights of any person. It is, however, asserted that if the phraseology of this provision be considered in connection with other parts of the law which pertain to the duties of the jury in these cases and the general purpose and

object of the Act, it is apparent that the Legislature intended to confer on juries the judicial power to determine the legal sufficiency of the evidence offered as tending to establish negligence, or contributory negligence, in the case. It is claimed that this idea is supposed by the language of subdivision 3, declaring: "In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, servant or employee other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employee other than the person so injured; and such other questions as may be necessary." We do not find this claim to be well supported, and incline to the view that subdivision 5 is merely declaratory of the law as it existed. If, however, it be assumed that the Legislature intended to confer judicial power on juries such as we have shown is inhibited by the Constitution, and such as would render this subdivision void, still this view of the subdivision does not necessarily render the whole Act void, for we are persuaded that such invalid part cannot affect the validity of the other parts of the law. It is a separate and distinct provision, and if removed from the law, leaves the other sections a complete and perfect regulation of the subject. It is manifest that the other provisions regulating the rights and remedies of the parties express the fundamental and dominant purpose of the Legislature, and that this part, if void, was not the compensation for, or the inducement to, the enactment of the valid portions. The provisions of subdivision 5 cover an independent subject, and can be completely severed and removed from the other provisions, without causing any change in them, or in their operative effect. Under such circumstances the invalid part of a statute should be dropped out, and the valid portions retained and held effective. We, however, conclude that subdivision 5 is merely declaratory of the law. No judicial power is therefore conferred on juries, and hence, it cannot affect the validity of the other provisions of the law. *State ex rel. Cornish v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *State ex rel. Chandler v. Main*, 16 Wis. 398; *Quiggle v. Herman*, 131 Wis. 379, 111 N. W. 479; *Ill. Cent. Ry. Co. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153.

The point is made that the provisions of subdivisions 3 and 4

are arbitrary and discriminatory in their effect, confer special favors on employees, and impose unjust burdens upon, and discriminate against the rights of railroad companies, and they therefore are repugnant to the principle of equal protection and due process of law. The rights and liabilities created by a law fixing liabilities for injuries to servants through the negligence of the railroad company or of co-employees and regulating the amount of recovery, are within the legislative power of police regulation, and in the foregoing and other cases have been approved in many respects as appropriate and reasonable. The necessity and reasonableness, and the propriety of the regulations prescribed, all rest in the legislative judgment to such an extent that we cannot say that such authority has been arbitrarily and unreasonably exercised in the Act before us. In *Quackenbush v. Wis. & M. Ry. Co.*, 62 Wis. 411, 29 N. W. 519, in passing upon the validity of a statute which excluded the defense of contributory negligence to an action for damages occasioned through the want of fencing the railway right of way, this court said: "It is doubtless true that the provision imposes an absolute liability in such a case. It certainly excludes the defense of contributory negligence where the corporation fails to perform the duty which the statute prescribes in the first instance. This is in the nature of a penalty for the neglect of the corporation to conform to a regulation which the Legislature seems to consider essential for the protection of life and property. We think there can be no doubt but such laws fall within the police power. Whether the rule of absolute liability in such a case is founded in wisdom and sound public policy is not for the courts to decide." See, also *Quackenbush v. Wis. & M. Ry. Co.*, 71 Wis. 472, 37 N. W. 837; *Employers' Liability Cases*, 207 U. S. 463 (*Howard v. Ill. Cent. Ry. Co.*, 207 U. S. 463, 28 Sup. Ct. 141).

The provisions of subdivision 6 are assailed as invalid upon the ground that they attempt to deprive railroads of the right of liberty employee shall exempt such corporation from the full liability imposed by the Act. This subdivision enacts that: "No contract or receipt between any employee and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this Act." The *Railroad Employees' Liability Act of 1875* (chapter 173, p. 293, Laws 1875) considered in *Ditberner v. C., M. & St. P. Ry. Co.*, 47 Wis. 138, 2 N. W. 69, provided that no contract, rule, or regulation between an employee and the company for ex-

empting the company from the liability imposed should be effective as between the parties. These provisions have obtained substantially as part of the law during the periods the various statutes on the subject have been in force. The purpose of these provisions obviously is to prohibit the company from effecting an abrogation of the liabilities created by the statute, and to preserve these rights for the benefit of the employees. The Legislature having created a right, it may, within its discretion, make provision against the deprivation and the impairment of the benefits arising under it, if in so doing the interested parties are not deprived of some constitutional right or privilege. The claim that the statute is an interference with the companies' constitutional right of liberty of contract does not give effect to important limitations on that right which are fully established in the adjudication. In *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, the court states: "While it may be conceded that, generally speaking, among the inalienable rights of the citizens is that of liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contract, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase of lottery tickets, to the minor the right to assume any obligations, except for the necessities of existence, to the common carrier the power to make any contract releasing himself from negligence, and indeed may restrain all in any employment which is against public policy. The possession of this power in no manner conflicts with the proposition that, generally speaking, every citizen has the right freely to contract for the price of his labor, services, or property." See, also, *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821. This clearly recognizes the power of the Legislature to restrict the right of abrogating by contract the duty, or to impair the benefit, created by it. To deny the Legislature this power would result in a denial to it of power to prohibit persons from contracting against what it declares to be public policy. In the following cases the power of the Legislature to restrict the liberty of contracting respecting rights created by it, which in their nature and origin were akin to the rights created by the statute before us, was upheld; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383; *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586; *Smiley v. Kansas*, 196 U. S. 447, 25 Sup. Ct. 289; *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16, 25 Atl. 246; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531, 12 Am. Neg. Rep. 480; *McGuire v. C., B. & Q. R. Co.*, 131 Iowa,

340, 108 N. W. 902. It is manifest from these adjudications that the object of the law in creating these liabilities is a subject of police regulations, not only for the benefit of employees, but also for the protection of life, person, and property, and therefore it has its reason and foundation in public necessity and policy. The provisions of subdivision 6 under this doctrine do not unduly infringe appellant's right of liberty of contract. The inhibition is a proper regulation to secure the benefits of the rights created, and serves to promote the security of the public by causing a more careful selection of competent servants and an improved enforcement of their duties.

We do not find that the provisions of subdivision 8 of the Act are involved in the determination of this case, aside from its bearing on the validity of the other parts of the Act. This subdivision seeks to extend the rights and liabilities created by the Act to injuries in other States, under contracts made in this State with employees. We are persuaded that the subdivision deals with a subject wholly independent of the other parts of the Act and severable from them. We discover no grounds for saying that this section was designed as compensation for, or inducement to, the enactment of the other parts, and that the Legislature would not have enacted the other parts without it. Under these circumstances, it does not affect the valid parts of the law. Hence we need not pass on the question of its validity in this case, and therefore we leave it undecided.

The allegations show that the plaintiff was an employee of the defendant, and that he was not working in a shop or office at the time he sustained the injury. It is alleged that his injuries were sustained while engaged in the line of duty, and that they were caused by the negligence of other employees of the defendant while in the discharge of their duties. The facts alleged are sufficient to state a cause of action under the statutes.

The order appealed from is affirmed.

MARSHALL, J., *dissenting*. (Opinion filed February 5, 1909).—The most important judicial authority lodged in this court is that of passing upon the validity of legislative enactments. That great power is given to the court by the Constitution, as definitely, if not as expressly, as power is given to the Legislature to enact laws. In its special field the court is absolutely independent. It is answerable only to the people as their will is seen in the fundamental law. The power is not discretionary, now to be exercised and then not to be, according as mere expediency may seem to dictate. It is obligatory in character as to every situation legitimately invoking its activity.

It must be jealously guarded and courageously vindicated upon all proper occasions, if our constitutional system of liberty is to endure.

Those who are wont to regard activity of the court's power mentioned as an unwarrantable, or at least a regrettable, interference with legislative authority, evince want of comprehension of our system of government or want of appreciation of the broad scope of those constitutional limitations, designed to guard at all points every individual in the enjoyment of every right essential to those fundamentals: "Life, liberty and the pursuit of happiness," for which "governments are instituted among men, deriving their just powers from the consent of the governed."

The importance of our constitutional restraints and the high prerogative power of applying them, is as progressive as is the need for regulation, to the end that such regulation may not overleap its legitimate boundaries and enter the domain of the destructive. It will be a sorry day for our country when the time comes, if it ever does, let us hope and believe that it never will, that the invincible weapon, — the Constitution — vitalized by an independent and fearless judiciary shall not efficiently bar excursions into the domain of unbridled interference with individual rights.

If that is more important to any one element in society than to another, it is the weakest, hence the most helpless. So it is of the highest importance to the public, and particularly to the most humble portion thereof, that courts should grapple, willingly and effectively, with every question presented for solution involving validity of legislation on constitutional grounds.

How wisely the fathers must have looked into the future, when — with the evident purpose of their language being regarded as a command from the body of the people to all in authority, so long as the Constitution should endure — they penned the words: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."

The saying that the court of last resort should willingly apply the test of constitutional limitations, is not to be taken as suggesting judicial desire or haste to declare that not law which has the form of law. In no case should the court enter upon any doubtful ground. It should accord to the co-ordinate department the highest consideration, not condemning its action so long as any reasonable basis can be discovered for upholding it, but if none can be discovered, not hesitating to put the stamp of judicial disapproval upon it.

The proper attitude indicated deserves, and will doubtless receive,

in the end at least, the approbation of the people by whom all power was delegated. The judicial disapproval does not nullify law, as the inconsiderate would say. It merely evidences that what is clothed in the mere habiliments of law is not law at all.

Those principles more often declared in recent years than formerly, are not new. They were laid down by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch, 137, and other cases, where that eminent jurist, in the early days of our constitutional system, gave thereto that vitality essential to its efficiency. He said for the court: "This original and supreme will organizes the government, and assigns to different departments their respective powers. * * * Those who framed written Constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an Act of the Legislature repugnant to the Constitution is void. * * * It is emphatically the province and duty of the judicial department to say what the law is. * * * If then courts are to regard the Constitution; and the Constitution is superior to any ordinary Act of the Legislature; the Constitution, and not such ordinary Act, must govern the case to which they both apply." The idea "that courts must close their eyes on the Constitution, and see only the law" would give to "the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. * * * That it "would reduce to nothing what we have deemed the greatest improvement on political institutions—a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction."

The foregoing observations are not indulged in because of any thought that my Brethren, in this case, not appreciating the principles stated, have unduly bowed to legislative authority, paying too much heed to its judgment as to that reasonableness which must be regarded as the infallible test of legitimacy of a police regulation. They have set the proper standard in that regard, but failed, in my humble opinion, respecting the question of fact as to what is reasonable beyond any fair doubt, basing their conclusion on misapprehension of the bearing of decided cases.

If this case could rest on the mere question of abstract right, from high moral ideals as to whether a person who is injured in the quasi-public work of operating a railroad, should have his loss charged up to the industry as a whole, and so added to the cost of things to be consumed in the activities of life, no one would be more ready to

take the side of the injured than the writer. Why such losses from an economic standpoint, and a humane view as well, regardless of any question of negligence, should not be treated as legitimate elements of the cost of production and distribution of products for human consumption, would be hard to say, satisfactorily if at all. The question here is not what ought to be or might be under a different system than that of imposing liability for losses to employees through accidental injuries upon the nearest employers, but what is legitimate under the present system. My general observations are to meet the prejudice which I conceive exists in non-judicial fields against limiting by judicial disapproval, the extent of that system, upon constitutional grounds, showing that when duty calls for such disapproval there is no field of discretion within which the judge can operate, though, in the individual case and all of its class, one might wish for a system whereby the wounds of all injured could be healed and the road now so broad and so frequently traveled to the zone of want, could be absolutely abolished.

The first question as to the constitutionality of the Act of 1907, arises under the opening part of section 1816 and subdivisions 1, 2 and 9, quoted in the court's opinion, imposing extraordinary liability upon every railroad company for injuries "to any of its employees," regardless of the branch of service in which they may be engaged, except "employees working in shops or offices." I make no question but that there may be classification as to risks and radical changes in common-law liabilities as to members of a particular class, but it is a classification of employees of railroads which entirely ignores hazards peculiar to railroads, by including in the special group all persons engaged in cutting grass upon the railroad right of way, or building fences, or building bridges, or doing work of construction and engineering, or providing supplies, such as ties and many other things that might be mentioned, even employees in any subsidiary business that might be carried on in aid of the railroad business, an army of persons in the aggregate having no connection whatever with the operating feature of a railroad, which only is characterized by special railroad risks, and excluding shop employees who are exposed to quite as much hazard of personal injury, and office employees who are as much exposed as many of the included subclasses? Is the mere character of the employee, by itself, a basis for classification, even then excluding a large subclass of employees laboring within, to some extent, the zone of special hazard, and including as stated, an army of others as far removed from any special risk as employees in any ordinary busi-

ness? True, the doctrine of classification has been carried by courts so far that the distinction between special and general legislation is very hard to discover, largely nullifying the safeguards against unequal legislation, but is it true that so arbitrary a classification as we have to deal with here is legitimate, under even the very liberal rules we have adopted?

If we, instead of tying closely to some definite rule, look to delusive expressions used in precedents here and there outside this State, not following their history back to discover what they are worth by the light of the real groundwork upon which they are based, and be governed by such groundwork rather than such expressions, which, looked at by themselves, would seem to have been used unconsciously of the real premises, there will be no escape from a condition of "classification run mad," which means in practical effect, no classification at all along definite lines, and the equality clauses of our Constitution, State and National, designed to prevent class legislation, in the special sense, will be of no practical effect whatever.

True, courts have laid down as limitations of the power of classification these rules:

1. Classification cannot be arbitrary. It must be based upon substantial distinction which makes one class really different from another.
2. The classification must be germane to the purpose of the law.
3. The classification must not be based upon existing circumstances only, so as to preclude the class opening to let in or let out members.
4. The law must apply equally to members of each class.
5. The characteristics of each class must be so far different from those of others as to reasonably suggest at least the propriety, having regard for the public good, of substantially different legislation therefor. State *ex rel.* Risch *v.* Trustees, 121 Wis. 44, 98 N. W. 954; Bingham *v.* Board of Supervisors of Milwaukee County, 127 Wis. 344, 106 N. W. 1071; Bloomer *v.* Bloomer, 128 Wis. 297, 107 N. W. 974.

In applying these rules I fully appreciate they furnish only a very general test of what is legitimate, but, nevertheless, they are quite as certain a guide as this or any other court has been able to formulate. Obviously, as has been often said, whether any particular situation falls within their boundaries, is a question of fact, as well as is the question of necessity or propriety of any proposed regulation, primarily for legislative solution, subject to interference by judicial

authority, only upon its appearing beyond all reasonable doubt that the boundaries of reasonableness have been overstepped. But the fact that the rules stated furnish only a general test, and that no better can be formulated, and the great importance of not extending the doctrine of classification beyond legitimate boundaries so as to practically nullify the safeguards against unequal legislation, render it highly important that such general rules should be given a pretty definite and certain meaning, not to be regarded as elastic; leaving only questions of fact to be determined as regards whether a given situation falls within or without the general scope.

We also fully recognize, that while classification must not be arbitrary, that has reference to the principles embodied in the rules, not to the boundary of any particular class. That must, of necessity, be definite and in that sense arbitrary.

Again we fully appreciate that the rule that classification must be based upon characteristics making the particular group so far different from others as to reasonably suggest need for or propriety of special legislative treatment, has reference to the group as such, regardless of whether each and every subject within the group has such characteristics to the same degree as every other subject, or not. But the dominant feature to some perceptible degree must affect substantially all. As said in *Nicholas v. Walter*, 37 Minn. 264, 33 N. W. 800, and often quoted with approval here:

There must be "some apparent natural reason — some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

So the general rules often stated, in substantially the same language, might well be extended by these explanatory rules which, in the cases referred to and many others, have become as well understood as those reduced to set forms of expression.

6. Rules 1 to 5 do not constitute a definite test of legitimacy of classification except as to general characteristics, leaving the question as to whether any given situation falls within their boundaries or not, matter of fact.

7. Whether upon the facts of any particular situation, it falls within the boundary of the rules for classification, is primarily for the Legislature, subject to judicial disapproval for unreasonableness beyond any fair doubt.

8. The rule that classification must not be arbitrary refers to the group as such not to differences in degree in which the individuals of the group are affected by the special circumstances calling for the classification.

There is this further principle to be observed in dealing with this subject which, for the purpose of having a reasonably complete code, so to speak, for testing any legislative enactment, challenged as invading the equality clauses of National or State Constitutions, may well be stated.

9. In classification for the purpose of legislative treatment under the police power, it is a judicial function to determine whether the particular subject is within the police power, also whether the Act has a real relation to the subject it ostensibly deals with, and whether the manner of treatment is unquestionably unreasonable. *State v. Redmon*, 134 Wis. 89, 114 N. W. 137; *Bonnett v. Vallier*, 136 Wis. 194, 116 N. W. 885; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499.

Having placed before us pretty fully, it is thought, the principles by which the law in question must be squared as regards whether it transcends constitutional limitations, let us proceed to make the measurements. I choose to test the enactment in the first instance, at least, by principles, not by mere precedents, which latter method, as before indicated, in case of failure to fully analyze the examples, is liable to lead one astray. That liability, I am constrained to believe, is what, in the main, in this instance, has led my Brethren to the conclusion embodied in the judgment from which I dissent.

The purpose of the law was to promote public safety both as regards patrons of railway companies and the servants of such companies, and that satisfies the ninth rule as to one feature, to wit: that as to whether it is within the police power unless the manner of treatment is clearly unreasonable.

The law applies equally to all subjects within the class and the class is not fixed so as to prevent opening to let in or let out members, satisfying the third rule.

Now how about substantial distinctions between the particular class and others under the first rule, and such differences in situations and circumstances of subjects within such class, satisfying the first and fifth rules? In considering this we necessarily blend the domain of discussion with the eighth rule, that, while the boundaries of the class, as a whole, must be arbitrary, and the differences in situation between the subjects within the class and those without must be significant, the classification must not be arbitrary as regards extending it to classes of individual subjects not in any degree affected by the particular situation or circumstances forming the basis upon which the classification is grounded, though the degree of affection as to individual subjects may widely differ. These three

rules, the first, the fifth and the eighth, and also the second, form one general field which may well be treated as such, since the domain of each rule so blends with that of the others as to render segregation for more particular analysis liable to confuse.

The purpose as stated is public safety, the term "public safety" being used, as indicated, with reference to the particular body of employees and those they indirectly serve; the patrons of the employers. Is it germane to such purpose to extend the classification, not incidentally, but substantially, to put it not too strongly, manifestly, to a very large degree beyond the field of special hazard in view in the purpose to conserve public safety, giving special benefit to an army of employees not affected at all by such special hazard or having to do at all with such hazard as regards patrons of the service and laying upon employers burdens accordingly? Face the rule that the difference in situation calling for the special treatment must pervade the class, not with equal degree as to each member thereof but to some extent as to substantially all, keeping in mind and giving due weight to the impracticability of fencing the class about so accurately as to exclude every one not affected in any degree by the special hazard and including every one so affected. How can the whole be substantially pervaded by the special circumstances if a very large proportion of the employees are not affected at all? To affirm that it can is to indulge, in my judgment, in a plain contradiction. So plain does it appear, as an original proposition, that I cannot perceive how one could venture to assert the contrary and ground a judicial decision upon it.

The mistake of my Brethren at this point, as I view the matter, is in testing the law by the second rule with reference to the mere classification of the employees, instead of the business they are engaged in. If a mining company conducts a store, a farm and other industries, subsidiary to the primary business, in which subsidiary employments the hazards of personal injury are no greater than like employment by private individuals or corporations, yet the number of the employees therein constitutes as large a proportion of the whole, perhaps, as the number in the specially hazardous branch, would a classification as regards extraordinary liability of the employer for personal injuries to employees including all the subsidiary employments, be germane to a law having for its purpose public safety as regards extraordinary hazards of mining? The negative seems so plain as to be beyond possible question.

Does not the illustration exactly fit the case in hand and condemn the classification attempted? The special situation and circum-

stance of railroad employment having to specially do with public safety, is confined to the operating department in the moving of cars and trains or work around them, or upon the track or in some way so as to come to some perceptible degree, within the zone of special risk, because of being more than ordinarily within the reach of those physical situations to which railroad perils, as ordinarily specialized, are incident.

The difficulty, under the Act before us, is not that the large number of employees outside the special zone of hazard are not affected in the same degree by the special circumstances as those within, but is that they are not affected thereby at all, thus rendering the inclusion of them within the group receiving special protection for the public benefit, manifestly arbitrary and the ostensible purpose to promote the public welfare a subterfuge for the actual purpose of extending a special privilege to a large number of persons without any legitimate common basis therefor.

At this point we may well note that the ostensible purpose of a law does not govern at all in testing it by constitutional limitations. The court may, yea it is its duty, to look behind the mere veil of any law which may appear legitimate, and if, in its substance, it is bad, to characterize it by its substance, not by its pretence. *Mugler v. Kansas*, 123 U. S. 623-661, 8 Sup. Ct. 273; *Matter of Application of Jacobs*, 98 N. Y. 98-110; *State v. Redmon*, 134 Wis. 89, 114 N. W. 137.

If anything more was needed to demonstrate, on principle, that the classification is purely arbitrary and so not germane to the purpose to conserve public safety, it is furnished in the exclusion of shop and office employees. Shop employees who, by common knowledge, form a very large subclass, are in some degree within the zone of special hazard. The repair of locomotives, testing them for suitability for the service, and the performance of other shop duties that might be mentioned, require service to quite a degree within the zone of special hazard.

Upon what ground was this large subclass of employees excluded from the particular benefits of the enactment and other large classes, entirely removed from the zone of special hazard, included? I have searched in vain for any possible legitimate ground therefor and so have been forced to the conclusion that the exclusion was purely arbitrary and probably unmindful of the constitutional restraints involved.

Of course, the foregoing condemnation could be easily avoided so as to save the law if it were subject to construction and could be

held as intended to apply only to employees within the field of special hazard, but that has been rejected, necessarily, by the judgment of the court in holding that plaintiff, a mere fence builder, is in the class affected favorably by the law.

My Brethren treat quite cursorily the feature of the law last discussed and say "shop and office employees" were excluded because not within "the unusual dangers and hazards of the business." How can we say that when the special danger in a large degree by common knowledge does extend to such employees? Again, how can one say that and in the same breath justify the inclusion of many other subclasses of employees, including fence builders, manifestly not exposed to the special dangers at all? I confess I do not understand the logic.

Again my Brethren, it seems, endeavor to escape from the dilemma the shop employee feature of the law presents, notwithstanding the doubtful justification I have referred to, by asserting that if the subclass were improperly excluded that would not invalidate the classification; resting on that mere assertion and a reference without comment to *State v. Evans*, 130 Wis. 381, 110 N. W. 241.

I confess inability to discover anything in that case warranting the reference. The court there merely laid down the principle that, in case of the establishment of a boundary line of classification with general characteristics of those on the side excluded from the special rights granted or duties imposed, differing from those included warranting the segregation, the fact of some excluded being as worthy, or as much in duty bound to bear the special burden as those on the other side, does not militate against the legitimacy of such line. Here the case is far different. The general character of the excluded subclass, not mere exceptional instances, calls for the special legislative treatment, quite as clearly as members of the included class, taken as a whole. The decision of the case, as I read it, condemns rather than supports the court's conclusion. It clearly is to the effect that the special class need not include all affected to any degree by the peculiar characteristic, but it must do so as far as practicable, and a plain unnecessary inclusion of a subclass not so affected and exclusion of a subclass so affected is fatal. The language of the opinion is: "It is suggested that this exemption is improper because these employees may be subjected to hazards or perils equally dangerous to those to which other employees are subjected. * * * That would not invalidate the classification." It will be noted that the court's logic is not confined to an excluded

class, having now and then a member on an equality with members of the included class, but to an excluded entire subclass of a general group, composed of men on the same plane, generally, as the common mass. It seems that, on more mature consideration, my Brethren would not wish to adhere to their logic. Would it be legitimate to legislate especially for all cities of the third class, except one or more specially named, or all cities having a population of 10,000 people except one or several specially excepted. Certainly not, on the most familiar principles of constitutional classification. Otherwise room for that special legislation which is illegitimate would be so broad as to nullify completely the fundamental law as to equality.

I have thus shown, it seems, that the law in question plainly offends against governing principles. Adjudications elsewhere which run counter thereto should not be adopted. The principles, not the adjudications inconsistent therewith, should prevail. The correct rule, as I understand it, is to make use of precedents to illustrate principles, not to avoid them. When the principles and the precedents conflict it is the latter, not the former, which should give way. I say this conceding for the purpose thereof that the authorities upon which the court rely are out of harmony with the principles, but such want of harmony will disappear as we proceed, and disappear in favor of my dissent.

There is no precedent in our adjudications out of harmony with my conclusion. If it were otherwise, I would not hesitate to contend with the doctrine of *stare decisis* in order to uphold the principles. Which would have to give way would be governed very much by circumstances unnecessary to discuss.

The only case referred to on the subject discussed, decided by this court, is *Ditberner v. C., M. & St. P. Ry. Co.*, 47 Wis. 138, 2 N. W. 69. It is sufficient to say that the question of constitutional classification was not there raised, discussed, or passed upon.

Reference to the decision on that subject is quite misleading, in my opinion. The legislation considered was upheld solely as a legitimate amendment to corporate charters under the reserve power in the Constitution. How that conclusion could have been reached, in view of the fact that there was no intent by the Legislature to make any such change, as evidenced beyond controversy, by the fact that it referred to foreign as well as domestic corporations, and the fact that no legislative authority exists to deal with the organic law of the former, is not perceived.

The court does not in the instant case attempt to support the

legislation as an amendment of corporate charters. Therefore, we need not pursue the subject of the Ditberner Case at length. It is sufficient to show that the decision is quite beside the matter it is now cited to support.

It is by no means certain the court, as at present constituted, would follow the Ditberner Case on the precise point there decided. It is interesting to note that it has been frequently cited in other jurisdictions with the same misapprehension as to the real point decided, as appears in the present instance, looking at language only. I think I am justified in saying, in passing, that the court does not at this time intend to indorse the doctrine that legislation of the sort under consideration can be regarded as an amendment of corporate charters, and does not intend to condemn it, but to leave the subject open for consideration at some future time when the precise point may require consideration.

It is unfortunate, in my view, that the court now says that on the former occasion it rejected the doctrine of *Deppe v. C., R. I. & P. R. Co.*, 36 Iowa, 52, 14 Am. Neg. Cas. 632, respecting the proper basis for classification of railway employees for legislation of the sort in question, since such basis was the subject decided in the latter but was one entirely foreign to the former. The doctrine of the Iowa case, as regards anything heretofore decided by this court as to constitutional law, stands entirely untouched.

My brethren refer to *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 15 Am. Neg. Cas. 96-98, in support of their decision. A history of the subject there treated will show that the case should be really regarded as authority to the contrary of such decision. It involved the law of Kansas making every domestic railroad company liable to any person injured by negligence of its engineers or other employees. It was quite general in its terms as regards the risks contemplated. It had received construction by the Supreme Court of Kansas, where it was sustained only by giving it the construction it had theretofore received by the Supreme Court of Iowa, from which State it was borrowed after such construction. It was restrained, though broad in its literal sense, to the particular persons exposed to the special hazard of railroad operations, or to the particular risks peculiarly incident to railroading. *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35, 15 Am. Neg. Cas. 117. It was held that the Act permitted such construction and required it, as the parent law was so construed prior to its adoption in Kansas. The Federal court sustained the law on the ground of the hazardous nature of the business, adopting the construction given thereto by the court from which the case was transferred.

Referring to the Iowa decision we find, unmistakably, that the initial legislation was only saved from condemnation as unconstitutional, by restraining it by quite extreme rules for judicial construction, to acts of persons within the narrow compass of engagement in the operating department characterized by the special hazard. It was said it could not be saved if it were held to extend to persons engaged in constructing the road. That "if it were so construed as to apply to all persons in the employ of railroad corporations without regard to the nature of their service it would be a clear case of class legislation. * * * Hence would be unconstitutional and clearly so."

My brethren also rely on *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176; *Chi., K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585; *Peirce v. Van Dusen*, 47 U. S. App. 339, 78 Fed. 693, 24 C. C. A. 280, and *Tullis v. Lake E. & W. R. Co.*, 175 U. S. 348, 20 Sup. Ct. 136. The first followed the case already reviewed so we read it contrary to the use thereof in the court's opinion. The same is true of the second. It went, unmistakably, upon the construction of the Kansas statute, given by the Supreme Court of the State, following that of the State from which the legislation was borrowed. Plaintiff prevailed because he was engaged in the peculiarly hazardous occupation of operating a railroad to which occupation the law was supposed to be restricted. Whether he was within or without the zone of special hazard was the mooted question. The case, as I read it, does not deal with the subject under discussion at all in any other respect. It seems to have been inadvertently cited.

The fourth case is said to deal with the validity of an Act abolishing the defense of negligence of a fellow-servant as to railway corporations and that it extended to the same class of railroad employees as does the law in question and that it was held proper to treat railroad employees as a special class, reaffirming the case I have reviewed involving the Kansas law. I cannot understand the case that way at all. The Kansas cases were referred to as warranting special regulations as to specially hazardous occupations, but by way of argument. The law was of a most general nature applying to all except municipal corporations, as regard particularly specified hazards of a peculiarly dangerous character and other specified risks out of the ordinary. The court adopted the construction given by the Indiana court in *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, to the effect that it dealt only with the special hazards peculiar to the business, not with employees regardless of

whether they were within the zone of special hazard or not, excluding some within such zone and others not and including others wholly outside thereof, as in the law in question.

The Indiana court, except as hereafter stated, grounded its decisions on adjudications of the Supreme Court of Kansas, Iowa and Minnesota and the approval thereof by the Federal Supreme Court under the rule that the construction of a State statute by the highest court of the State will be followed by the Federal court as to cases arising in such State, each and all of which decisions are of the character of those heretofore referred to. Attorney General *v. Railroad Companies*, 35 Wis. 425, and the *Ditberner Case* were referred to, neither of which dealt with the subject of constitutional classification at all, as we have heretofore seen.

Thus it appears plainly the learned Indiana court did not discover the real basis for the decision in either of the cases cited, though the fact remained that it sustained the law and the Federal court followed its decisions upon the theory that it dealt only with a class including all within the zone of peculiar hazards and not including others. The point being made in the Indiana court that the law included many corporations whose business was not characterized by any hazard other than those incident to the same business conducted commonly by natural persons, the court declined to deal with the question, holding that the law was good in any event as to railroad companies. Whether that was sound or not may admit of some doubt.

At this point, following the order of the court's treatment, we reach a further reference in the opinion to the subject of shop and office employees, and their exclusion is justified upon the authority of numerous cases cited, including *Minn. & St. L. R. Co. v. Herrick*, 127 U. S. 210, and *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, and *Pitts., C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1. I need not pursue that branch of the case. Suffice it to say the opinion does not point out their application. How they justify exclusion of a subclass which is largely within the field of special hazard dealt with and inclusion of other subclasses which are not, my reading fails to discover. So far as they touch the subject they all go back by a path, unmistakably marked, to the Iowa decision sustaining such legislation within the zone of special hazard as the only legitimate basis of classification and the only way of saving it from invalidity. That is so, as we have seen, as to all cases we have referred to.

The same is true with the court's additional citation, the *Georgia R. & B. Co. v. Miller*, 90 Ga. 571, 14 Am. Neg. Cas. 234, 16 S. E.

939. There was no question of exclusion and inclusion disregarding hazards, as in this case.

A further additional citation, *Atch., T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, deals solely with the validity of a law allowing attorney's fee in addition to damages in case of recovery under a statute designed to penalize corporations for violating police regulations as regards setting fires. The Federal court simply followed the decision of the State court, but in any event the case has too remote a bearing here, if any at all, for me to appreciate it.

I have now reviewed all of the supports relied upon for the conclusion from which I dissent, on the subject of constitutional classification. The entire group of citations are referable to *Deppe v. Chicago, R. I. & P. R. Co.*, 36 Iowa, 52, 14 Am. Neg. Cas. 632 — which they expressly, directly or indirectly, follow — conceded by my Brethren to be contrary to their conclusion. They failed as it seems, to discover that the decision of the Supreme Court of Kansas, adopted by the Supreme Court of the United States, merely upheld the Kansas law with the construction given by the Iowa court.

My Brethren disregard without difficulty *Lavallee v. St. Paul, M. & M. R. Co.*, 40 Minn. 249, 16 Am. Neg. Cas. 339, 41 N. W. 974; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. 156, 16 Am. Neg. Cas. 339; *Pearson v. Chi., M. & St. P. R. Co.*, 47 Minn. 9, 49 N. W. 302, 16 Am. Neg. Cas. 338; *Weisel v. Eastern R. Co. of Minn.*, 79 Minn. 245, 82 N. W. 576, 7 Am. Neg. Rep. 635, and *O'Neil v. Great N. R. Co.*, 80 Minn. 27, 82 N. W. 1086. But the Minnesota law was quite as sweeping in its provisions as ours, omitting the feature of the latter as to shop and office employees. It was construed the same as the Iowa law and the Kansas law and sustained upon the same ground as they were sustained. It seems my Brethren do not give proper dignity to those cases by merely suggesting that the basis for classification was held to be the extraordinary hazard of employees. I think in that there is confusion between purpose of the law and the element of being germane to the purpose. The purpose of all such laws is public safety. The basis of classification has regard to the element of adaptation. The decisions which are supposed to support the conclusion this court has reached, as well as the others, all make the special hazard the basis for the classification. They all deal with a single class of legislation and are in harmony.

True, the Minnesota court said, "The manifest purpose was to give the benefit to employees engaged in the hazardous business of

operating railroads." Can there be any possible question but that the purpose of the Act in question is to give special benefits to the same class and to others? The fact that the special benefits, in a sense penalize the employers, operates to the benefit of the people generally as regards safety, does not militate against the fact that the primary benefit in the mind of the Legislature was to employees. I see no escape from the conclusion that all these cases support the conclusion I have arrived at on principle alone and are in perfect harmony, leaving no room to reject some and adopt others.

The foregoing covers all ground traveled over by the court to its conclusion. I might safely, I have shown, rest my contrary conclusion on the precedents the court relies on if precedents alone were to govern. It was no fault of the learned counsel for appellant, that the court did not take notice that the starting point of all the judicial authority referred to by respondent's counsel and the court is *Deppe v. Railway Co.*, 36 Iowa, 52. These further cases cited by appellant's counsel from other States, also based on the logic of the Iowa case, were not referred to in the court's opinion. *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 So. 174; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533; *Beleal v. Northern Pac. Ry. Co.*, 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453. The gist of all is in the early Iowa Case.

The upshot of the foregoing is that if the Act in question could be sustained at all, it would have to rest on a preliminary construction of the statute in harmony with the numerous decisions referred to. I see no way to reach the preliminary construction because of the plain, unmistakable purpose in the Act to include all employees regardless of whether operating strictly within the zone of railroad risks or not, with the exception noted, and that exception necessarily negatives any theory that any other employees are excluded under the canon of construction "*expressio unius est exclusio alterius*." As the injured person here was a mere fence builder and not so injured by any peril properly denominable as a railroad risk, the complaint fails to state a cause of action under the universal rule for construction of such statutes as ours, where so framed as to be open to construction. Therefore, from any viewpoint the pleading can be reasonably measured it fails, in my judgment, to state a cause of action.

The decision upholding the third subdivision of the law upon the theory that it is a mere declaration of the unwritten law, I cannot subscribe to. True, we should not declare a law unconstitutional if a construction of it can be reasonably given which will avoid that

result, but just as true as law not open to construction should never be varied in its plain ordinary sense by an effort to construe it. It is only where uncertainty of sense begins that the office of judicial construction can properly become active. Further, just as true it is a canon of construction that it is to be presumed in the enactment of a law that the Legislature intended some change in existing law, written or unwritten, or to make a mere regulation of some sort. Any construction is to be avoided which would convict the law-making power of merely spreading a collection of words on the record in the form of a law, but in fact meaning nothing, if any rational view can be taken of the enactment leading to a different result. Again, in construing a law, after discovering ambiguity justifying it, the court should look, among other things, to its reason and spirit and read it according to the intent, if that can be discovered, expressed within the broadest reasonable scope of the words used; the fair ordinary meaning of such language, however, to be taken, unless it appears clearly that some other was intended. All these principles are so familiar that citations of authority in support of them are unnecessary.

In the face of the principles stated and the common knowledge that at the time of the enactment there was more or less sentiment against courts exercising the judicial power to take cases from juries on the question of contributory negligence, upon such a question appearing by the evidence to be one of law only, the purpose of the Legislature is quite plain. The state of public mind suggested, whether reasonable or not, we need not take time to discuss. Considerable unrest under the administration of the law in that regard existed going to the extent of suggesting that courts were prone to usurp the functions of the jury. It was not appreciated, it is thought, that the question of whether evidence shows contributory negligence beyond any reasonable view to the contrary, was never a jury question and that no trial court could hold to the contrary without a breach of judicial duty. In that light and in the light of the plain letter of the enactment in question and the rules we have referred to, I could not, if I would, escape the conclusion that the Legislature intended to, and supposed that it could, take from courts a power they had been accustomed to exercise in the ordinary performance of their duties under the plain mandate of the fundamental law.

Can there be any mistaking the meaning of the words, especially in the light of what has been said:

"The court shall submit to the jury the following questions: First,

whether the company * * * was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, * * *; and such other questions as may be necessary." Discretion was left, it will be noted, as to "such other questions," but none as to the special question covering the vital points of negligence. So looking at the legislative effort, all would agree that it is a usurpation though an innocent one of course.

I would be exceedingly slow in reaching a conclusion that the Legislature intended to pass an unconstitutional law. In all my experience as a lawyer and judge, covering a period of nearly forty years, I have never known of an instance of such an effectuated intent and do not expect to meet with any in the future. It was a mistake in my judgment, that is all. Nevertheless, it evinces that the entire enactment was allowed to take the form of law without being subjected to careful legislative scrutiny in the light of constitutional tests. To some extent, I should say, the rule applies to such a case, that in case of a court's conclusion of fact based on a wrong rule of law, the ordinary presumption of its correctness does not obtain. So when the Legislature makes a law, so called, not taking note that its power is limited, its judgment on the basis entitling it to controlling significance within all reasonable bounds, is not incorporated into the work.

The view the court took of the Act rendered it unnecessary, as was supposed, to consider subdivision 8, providing that in case of an action in this State to enforce liability for an injury occurring in a sister State, the defendant shall not be permitted to plead or prove the decision of the latter State as a defense. The view I have taken rather calls for such consideration, but it may be done briefly. The provision was copied substantially verbatim from the law of Indiana. Doubtless it was borrowed, overlooking the fact that January 17, 1902, and prior to the adoption here, the Supreme Court of Indiana held that it was clearly an unconstitutional interference with property rights. The logic of the court's opinion on the subject is unanswerable. When a person is injured in a sister State through breach of duty of another as regards his personal safety such person becomes vested, at once, with such rights of action to remedy the wrong as the law of such sister State affords and none other, and, in case of his death, the rights of personal representatives are like-

wise restricted. The Act being transitory, the defense is likewise transitory. The two necessarily upon familiar principles go together. A law of a State other than that of the injury, allowing prosecution of an action for the wrong upon a different basis than the right and preventing the use of a vested defense, is confiscation. That doctrine has support in our own decisions, in the decisions of the Federal Supreme Court, and in the general trend of authority. *Second Ward Sav. Bank of Milwaukee v. Schranck*, 97 Wis. 250, 73 N. W. 31; *Peninsular Lead and Color Works v. Union Oil & Paint Co.*, 100 Wis. 488, 76 N. W. 359; *Eau Claire National Bank v. Macauley*, 101 Wis. 304, 72 N. W. 176; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102; *Hovey v. Elliot*, 167 U. S. 409, 17 Sup. Ct. 841.

The parts of the law thus invalid, as I think, leave nothing which the Legislature would have enacted independently. Therefore, upon familiar principles the enactment is wholly void.

It is interesting to note that in any event that the law may be very short-lived. The Federal Supreme Court in the *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141 (*Howard v. Ill. Cent. R. Co.*, 207 U. S. 463), held that a law which includes employees engaged in interstate commerce is as to that feature a regulation of such commerce. The Federal law was condemned because it dealt with all employees of a railroad doing interstate business whether engaged at the time of the injury in such business or in intrastate business, and that the two features were inseparable. Hence the whole was held unconstitutional. Following the same line of reasoning, this court has very recently held that an Act limiting the hours of railway telegraphers of a railroad company doing both interstate and intrastate business, is necessarily a regulation of interstate commerce, as the two kinds of business, done by the same employees are inseparable, hence that it is unconstitutional, Congress having already occupied the field as to interstate commerce and by a law materially different from the State law.

Since June 11, 1906, the same situation as we dealt with regarding telegraphers has existed as to injuries to railway employees. On that day Congress passed an Act, supposed to be free from the infirmity which led to condemnation of the one in the *Employers' Liability Cases* (207 U. S. 463) and thereby as to personal injuries to railway employees received in the course of their service in interstate transportation occupied the field under the commerce clause of the Constitution. The law (see U. S. Comp. St., Supp. 1907, p. 891; Fed. St. Ann. 1907, p. 68) conflicts in a radical degree with our State provisions. The two may not be able to stand together under

the logic of the decision in the Telegraphers' Case, 126 U. S. 1, 8 Sup. Ct. 778 (State v. C., M. & St. P. R. Co., 136 Wis. 407). Whether such legislation will not wholly displace our State Act is in sight, but not for decision at this time.

We now close this rather lengthy but I trust not too lengthy opinion. The vast importance of the question at issue seemed to justify the extensive treatment I have devoted thereto. With the amount of labor we have, work of this independent sort would not be entered upon other than under the stimulus of a supposed command of duty. The learned counsel for appellant and counsel for respondent as well, presented the case with distinguished ability and helpfulness. In my view, as indicated, the position of appellant is grounded on principle and on a long line of well-reasoned judicial authority with which there is, substantially, no conflict. So believing it seemed a duty to the court, to the profession and to the administration of the law generally, to express fully my views, I will say here, as on another occasion for the court, we do not doubt but that the very best of intentions were the mainspring of the enactment in question, but good intentions can never save a legislative effort if the paramount law condemns it. The Constitution was made to guard the people against the dangers of good intentions as well as bad intentions and mistakes. The former may excuse a void enactment, but never justify it.

It is never a pleasant duty to perform, to condemn a law as void. The dignity of the legislative office is high. Co-ordinate branches of the government owe great deference thereto while maintaining the dignity of their own field of activity. It is upon co-operation of the three grand divisions of our governmental system upon that high plane, each doing its duty firmly and submitting cheerfully to the authority of the other within the constitutional scope thereof that we must rely for that strong, efficient government which the fathers endeavored to establish by a Constitution, which deserves our most distinguished consideration as an ideal declaration of principles essential to the purpose declared in its opening lines.

Perhaps it is unnecessary to close with the statement that it is my opinion the demurrer should have been sustained.

WINSLOW, CH. J., *concurring*. (Opinion filed April 24, 1909. Reported in 120 N. W. 756).—While I heartily agree with the opinion of the court in this case, I deem it proper, in view of the importance of the case, to add a few words of my own, in order to express in my own way the grounds upon which I understand the decision to be based.

The main contention of appellant is that the law is unconstitutional, because not confined to those employees who are actually engaged in operating trains or incurring risks peculiar to the railroad business. The claim is that there can be no classification, except a classification of employees based upon the character of the risk incurred. There is doubtless much authority which justifies this claim. Such was unquestionably the controlling idea, when laws of this nature first made their appearance on the statute books. Many such laws were confined by their terms to injuries resulting from hazards peculiar to the railroad business, and some were upheld only because the courts were able to construe them as intended only to cover injuries resulting from such hazards. Whether the last-named courts would now feel required to so construe such laws in order to sustain their constitutionality may be doubtful. I think not, and for this reason:

Railway corporations engaged in the business of common carriers have been classified and subjected to peculiar and special legislation from the earliest times, and properly so. Their situation and the peculiar character of their business and its relation to the public safety demands special legislation. This law, therefore, in classifying railway carriers and subjecting them to different liabilities, only follows many other laws whose constitutionality never has been questioned. Viewed in the light of a classification of railway carriers, rather than as a classification of employees or dangers, there seems to me no reason why it should not be sustained without difficulty. Railway carriers conduct a business unique in its dangers, both to its employees and to the public, and are charged with unique liabilities to the entire public. These are considerations which suggest or demand special and peculiar legislation; and this legislation may well be along the lines of an increased liability for the negligence of their own employees, not only in the operation of trains, but in all the railway business. From the fence repairer to the locomotive engineer, practically every railway employee is doing something upon which depends, not only the successful operation of the railroad, but the safety of the passengers who ride over it. The fence repairer in the present case was engaged in assisting in making travel over the road safe from the danger of collision with animals. He was performing a duty to the public with which the railroad is charged. The man repairing fences on a farm is performing no such duty. Herein lies the distinction between the two acts, and herein lies, also, the reason which calls for special legislation requiring higher care on the part of the railway company in the

selection of all of its employees, and imposing greater liability for the acts of employees than is required of an ordinary employer.

In a word it is proper to subject railway carriers to a higher degree of liability for the neglect of their servants, not simply because the business has peculiar dangers, but because it bears a peculiar relation to the safety of the public which no other business bears, and hence greater diligence in the selection of its employees may justly be demanded and enforced by means of a law imposing a heavier liability than that imposed on ordinary employers. This principle was, I think, fully recognized in the *Employers' Liability Cases*, 207 U. S. 463 (*Howard v. Ill. Cent. Ry. Co.*, 207 U. S. 463, 28 Sup. Ct. 141), where the Federal law which attempted to make an interstate railway carrier liable to any of its employees for injuries resulting from the negligence of co-employees, notwithstanding slight contributory negligence, was under consideration. It is true that the law was held void, but only on the ground that it covered intrastate commerce, as well as interstate commerce, and hence was beyond the power of Congress to enact. Otherwise the law, which covered by its terms all employees, was practically approved. Mr. Justice White, who wrote the opinion of the court, says that if the law applied to the District of Columbia and the territories only it could not be questioned, because the legislative power of Congress over these regions is plenary, and not dependent on the interstate commerce clause of the Constitution. Mr. Justice Moody, in his dissenting opinion, says: "It is rather startling to hear that in enacting laws applicable to common carriers alone Congress has made a capricious and arbitrary classification. From time immemorial the common law has set apart those engaged in that business as a peculiar class, to be governed in many respects by laws peculiar to themselves."

Thus it is seen that the Supreme Court of the United States, in treating of a law substantially identical with the law before us, regarded it as a law classifying railway carriers, and not as a law classifying laborers. In this view I can see no difficulty with the main provision of the law, which makes railway carriers liable to an employee who may be injured by the negligence of a co-employee. It is a classification of railway carriers which is reasonably suggested, if not demanded, not merely by the peculiar risks incurred by the employee, but by the highly important duties which the railway companies and their employees are in duty bound to perform for the safety of the public.

As to the exclusion of shop and office employees a different ques-

tion arises. It is undoubtedly true there may be classification among employees, if the circumstances of the employment are so far different as to suggest the propriety of classification. As a general rule shop and office employees are in less danger from the negligence of their co-employees, and perform duties less directly connected with the safety of the traveling public, than train employees and construction or repair gangs. The Legislature deemed the difference in duties sufficient to exclude shop and office employees from the provisions of the law, and the court would not be justified in holding that the Legislature was wrong in its judgment.

HASBROUCK v. ARMOUR & CO. ET AL.

Supreme Court, Wisconsin, May, 1909.

DANGEROUS ARTICLE—LIABILITY OF MANUFACTURER AND VENDOR—CUSTOMER INJURED BY FOREIGN SUBSTANCE IN SOAP—MANUFACTURER AND VENDOR NOT LIABLE.—Plaintiff purchased a cake of soap from one of the defendants which was manufactured by the other defendant, the latter guaranteeing its purity and harmlessness. While using the soap for toilet purposes the plaintiff was injured by a needle which was imbedded in the soap, the injuries to his hand producing serious consequences. Suit was brought against defendants for alleged negligence in manufacture and sale of the soap. *Held*, that the manufacturer was not liable, since the dropping of the needle into the soap was unintentional and was a remote possibility, an extraordinary occurrence, and serious injury to a person using the soap was an unusual consequence; and the seller was not liable, as he had no knowledge of the presence of the needle, and could not, in the exercise of ordinary care have discovered the condition (1).

1. *Liability of manufacturer and dealer for injuries to third persons caused by use of dangerous article or commodity.* See, among other cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907), the following:

Smith v. Clark Hardware Co., (Ga. 1897) 3 Am. Neg. Rep. 12, 100 Ga. 163 (cartridges); *O'Neill v. James*, (Mich. 1904) 17 Am. Neg. Rep. 561, 138 Mich. 567 (cider bottle); *Knelling v. Roderick Lean Mfg. Co.*, (N. Y. 1903) 15 Am. Neg. Rep. 86, 88

App. Div. 309, rev'd in 19 Am. Neg. Rep. 407, 183 N. Y. 78 (land roller); *Watson v. Augusta Brewing Co.*, (Ga. 1905) 19 Am. Neg. Rep. 107, 124 Ga. 121 (foreign substance in beverage); *Burgess v. Sims Drug Co.*, (Iowa, 1901) 10 Am. Neg. Rep. 42, 114 Iowa, 275 (drugs); *Ives v. Welden*, (Iowa, 1901) 10 Am. Neg. Rep. 590, 114 Iowa, 476 (gasoline); *Burk v. Creamery Package Mfg. Co.*, (Iowa, 1905) 18 Am. Neg. Rep. 62, 126 Iowa, 199 (beverage); *Nat. Oil*

NEGLIGENCE—DEFINITION.—Negligence in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another, and this duty may, by operation of law, arise between persons who by contract bring themselves into certain relations, or such duty may be imposed by statute or by rule of the common law and due only to particular persons or classes of persons or due to all persons.

MANUFACTURER AND VENDOR—DANGEROUS ARTICLE—DUTY TO CONSUMER.—The duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally, and there is no privity nor particular relation carrying with it special duties or a special degree of care in such case.

DANGEROUS ARTICLE—NOTICE—DUTY AND LIABILITY TO CONSUMER.—The manufacturer or dealer who puts out, sells and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated.

DANGEROUS ARTICLE—NEGLIGENCE—BREACH OF DUTY.—A manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling or directing the use of such article, if such injury to others might have been reasonably foreseen in the exercise of ordinary care.

DANGEROUS ARTICLE—NEGLIGENT SALE—LIABILITY FOR INJURY TO PERSONS.—A manufacturer or vendor putting out and selling articles inherently dangerous, such as explosives or poisons, without notice of their dangerous nature, or with a mislead-

Co. v. Rankin, (Kan. 1904) 16 Am. Neg. Rep. 40, 68 Kan. 679 (kerosene); *Provost v. Cook*, (Mass. 1903) 15 Am. Neg. Rep. 78, 184 Mass. 315 (poisoned oats); *Skin v. Reuter*, (Mich. 1903) 15 Am. Neg. Rep. 86, 135 Mich. 57 (diseased hogs); *Williams v. Wiedman*, (Mich. 1904) 15 Am. Neg. Rep. 347, 135 Mich. 444 (putrid meat); *Stowell v. Standard Oil Co.*, (Mich. 1905) 17 Am. Neg. Rep. 569, 139 Mich. 18 (illuminating oil); *Slattery v. Colgate*, (R. I. 1903) 14 Am. Neg. Rep. 467, 25 R. I. 220 (soap); *Waters-Pierce Oil Co. v.*

Davis, (Texas, 1900) 12 Am. Neg. Rep. 486, 24 Tex. Civ. App. 508.

See, also, *Farrell v. Manhattan Market Co.* (Mass.) 198 Mass. 271, 84 N. E. 481 (sale of alleged unwholesome food), reported in this volume of AM. NEG. REP., p. 142, *ante*.

See *Bruckel v. Milhau*, 116 App. Div. 832, 102 N. Y. Supp. 395; *Glaser v. Seitz*, 35 Misc. 341, 71 N. Y. Supp. 942; *West v. Emanuel*, 198 Pa. St. 180, 47 Atl. 965, 53 L. R. A. 329 (sale of drugs; dealer not liable in absence of negligence.)

ing notice or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care (2).

2. *Dangerous articles.* — In *WOLCHO v. ARTHUR J. ROSENBLUTH & Co.*, (*Connecticut*, December, 1908) 71 Atl. 566, judgment for plaintiff in the Superior Court, New Haven county, was *affirmed*. It appeared that: "While the plaintiff's intestate, Lena Wolcho, was using upon her stove a liquid called 'stoveline,' prepared and sold by the defendant, it suddenly ignited and set fire to her clothing, and she received injuries from which she died. The complaint alleges that said preparation 'contained a large quantity of inflammable material, and, when used upon hot substances, becomes dangerous to use, in that it is liable to ignite and cause a fierce blaze in the nature of an explosion which it is difficult to control,' and that the defendant negligently sold said article without warning purchasers of its dangerous character." Judgment for plaintiff *affirmed*. Opinion by HALL, J.

In *WATERS-PIERCE OIL Co. v. DESELMs*, (*U. S. Supreme Court*, February, 1909) 212 U. S. 159, 29 Sup. Ct. 270, judgment for plaintiff (18 Okla. 107, 89 Pac. 212) was *affirmed*. This was an action against the oil company to recover damages for the death of plaintiff's two children resulting from an alleged explosion of a highly inflammable and explosive substance, consisting of a mixture of coal oil and gasoline, which was used by plaintiff's wife to start a fire in the stove, and which mixture, it was alleged, had been bought by plaintiff as coal oil from dealers who supposed it to be such, although their vendor, the defendant oil company, knew the dangerous character of the article and yet had sold it as coal oil. Defendant was

held liable and judgment of the Supreme Court of the Territory of Oklahoma, affirming judgment for plaintiff for \$14,500, was, on writ of error to the Supreme Court of the United States, *affirmed*.

The constitutionality of the oil provisions of Oklahoma, Session Laws, 1899, p. 186, § 2, was passed upon affirmatively.

In the course of his opinion MR. JUSTICE WHITE said:

"In *National Sav. Bank v. Ward*, 100 U. S. 195, relied upon by the oil company, it is true an attorney-at-law was held not to be liable to a third party for the negligent performance of a contract to examine the title to certain real estate, because of the absence of a contractual relation. But the distinction between the principle which was there controlling and the one which is here applicable was pointed out in the opinion of the court in that case, where it was said (p. 204):

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through

APPEAL from Circuit Court, Winnebago County.

ACTION by F. M. Hasbrouck against Armour & Co. and another. From an order sustaining separate demurrers to the complaint, plaintiff appeals. The case is stated in the opinion. *Order affirmed.*

many intermediate sales before it reached the hands of the person injured. *Thomas v. Winchester*, 6 N. Y. 397, 410.

"And the same principle was applied to a sale of dangerous oil in *Wellington v. Downer Kerosene Co.*, 104 Mass. 64, where it was said: 'It is well settled that a man who delivers an article which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault.' And the like doctrine has been expounded in many cases. See, especially, *Elkins v. McKean*, 79 Pa. St. 493, and *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, where the doctrine is clearly and forcibly stated and the many authorities sustaining the same are cited. * * * See, further, *Clement v. Crosby & Co.*, 148 Mich. 293, 11 N. W. 745, and *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227, 17 Am. Neg. Rep. 569, and authorities cited in both cases."

In *STATLER v. RAY MANUFACTURING Co.*, (N. Y., June, 1909) 195 N. Y. 478, it is held that "in the case of an article of an inherently dangerous nature, a manufacturer may become liable to third parties having no contractual relation for a negligent construction, which, when added to the inherent character of the appliance, makes it imminently dangerous and causes or contributes to a resulting injury not necessarily incident to

the use of such an article if properly constructed, but naturally following from a defective construction." It appeared that plaintiff and another were severely scalded and a third person killed by the explosion of a large coffee urn, which urn was manufactured by the defendant for use in hotels. Defendant did not sell the urn to plaintiff but to a jobber, who in turn sold the same to a company of which plaintiff was an officer. Plaintiff recovered below (125 App. Div. 69), but judgment was reversed by the Court of Appeals for several errors in rulings on evidence.

See, also, *CLEMENT v. ROMMECK*, (Michigan, October, 1907) 149 Mich. 595, 113 N. W. 286, 13 L. R. A. (N. S.) 382, stove polish bought of defendant manufacturers by defendant merchant who sold it to a customer who was injured by its explosion while it was being used to polish up customer's gas range; demurrer of defendant sustained, the merchant not being liable; in absence of negligence on his part, to the customer for injuries sustained while using it according to directions.

See, also, *Clement v. Crosby & Co.*, 148 Mich. 293, 111 N. W. 745, 10 L. R. A. (N. S.) 588, a case arising out of the same facts as in the Rommeck case (*supra*), the defendant being the manufacturer of the stove polish, where order overruling demurrer of manufacturer was affirmed.

See also, subsequent decision in *Clement v. Crosby & Co.* (Michigan, July, 1909) 122 N. W. 263, where judgment for plaintiff for \$1,500 in the Circuit Court, Wayne county, was affirmed.

EATON & EATON (H. B. JACKSON, of counsel), for appellant.

THOMPSON, PINKERTON & JACKSON and WILLIAMS & WILLIAMS,
for respondents

See case note on liability of dealer for personal injuries from article not obviously dangerous, 13 L. R. A. (N. S.) 382-383, in which several cases are cited.

In *WELLINGTON v. DOWNER KEROSENE OIL Co.*, 104 Mass. 64, action of tort for injury to plaintiff's person and property by the explosion of naphtha which he was burning in a lamp, the defendants having sold a barrel of naphtha to another who retailed the same and sold a part thereof to plaintiff for illuminating purposes, plaintiff's exceptions to direction of verdict for defendants were sustained. GRAY, J., rendered the opinion. After discussing the first count of the declaration which set out the facts of the injury, the learned judge said: "The second count of the declaration expressly avers that the defendants sold naphtha to Chase for the purpose of being retailed and resold to be burned in a lamp for illuminating purposes, knowing it to be explosive and dangerous to life when so used, and knowing Chase's business to be that of a retailer and his purpose to retail and resell the same to the public to be so used; that Chase resold a part thereof to the plaintiff to be so used, and, while he was so using it, it ignited and exploded, and injured his person and property; and that both Chase and the plaintiff were ignorant of its dangerous qualities. Proof of the facts thus alleged would show that the defendants were guilty of a violation of duty in selling an article which they knew to be explosive and dangerous, for the purpose of being resold in the market, without giving informa-

tion of its nature, and were therefore bound to contemplate, as a natural and probable consequence of their unlawful act, that it might explode or ignite, and injure an innocent purchaser or his property, and to answer in damages for such a consequence if it should come to pass. The ruling of the learned judge who presided at the trial was therefore erroneous, and the exceptions must be sustained."

* * * Continuing, GRAY, J., said: "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault. Thus a person who delivers a carboy, which he knows to contain nitric acid, to a carrier, without informing him of the nature of its contents, is liable for an injury occasioned by the leaking out of the acid upon another carrier to whom it is delivered by the first, in the ordinary course of business, to be carried to its destination. *Farrant v. Barnes*, 11 C. B., N. S. 553. So a chemist who sells a bottle of liquid, made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it for washing her hair. *George v. Skivington*, L. R. 5 Exch. 1. And a druggist who negligently labels a deadly poison as a harmless medicine,

TIMLIN, J. — The complaint averred that the respondent Armour & Co. is a corporation of Illinois, licensed to do business in this State, and the respondent S. Heymann Company is a Wisconsin

and sells it so labeled to dealers in such articles, is liable for an injury to any one who afterwards purchases and uses it, if there is no negligence on the part of the intermediate sellers or of the person injured. *Thomas v. Winchester*, 2 Selden, (N. Y.) 397; *Davidson v. Nichols*, 11 Allen, (Mass.) 519, 520; *McDonald v. Snelling*, 14 Allen, (Mass.) 290, 295."

In *THOMAS v. WINCHESTER*, 2 Selden, (6 N. Y.) 397, where plaintiff was made sick by a dose of belladonna which she had bought from druggist as dandelion, on prescription by physician, defendant was liable, he having bought the belladonna and put it into a jar and labeled it dandelion.

See also *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Allan v. State S. S. Co.*, 132 N. Y. 91; *Smith v. Hays*, 23 Ill. App. 244; *Hall v. Rankin*, 87 Iowa, 261; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219; *Brown v. Marshall*, 47 Mich. 576.

In *BRUCKEL v. J. MILHAU'S SON*, (N. Y. Supreme Court, Appellate Division, Second Department, January, 1907) 102 N. Y. Supp. 395, 116 App. Div. 832, an action against a druggist for personal injuries caused by the explosion of a glass bottle sold for use in aerating liquids, judgment for plaintiff in the Trial Term, Kings county, was reversed. The opinion was rendered by JENKS, J., in the course of which the learned justice said:

"The question of this case is whether the defendant, as vendor of the apparatus consisting of a sparklet bottle and capsules for use therewith, was chargeable with negligence in the sale thereof.

The plaintiff complained that the defendant at the time of the sale well knew that the bottle was unsafe and dangerous to use, and unfit for the purpose intended, and that the defendant sold and delivered the bottle without disclosure. But at the end of the case he amended his plea by adding, after the allegation that the defendant 'knew,' the allegation, 'or with reasonable care and diligence ought to have known.' There is no allegation or proof of any warranty or representation made by the defendant, so that the case presents a naked sale. It was submitted to the jury on the theory of negligence. The learned court charged without exceptions that there was no direct evidence that the defendant knew anything of the dangers of the article, and that the doctrine of '*res ipsa loquitur*' did not apply.

"On October 31, 1902, the defendant had the apparatus on sale in its drug shop. The plaintiff, who had heard of the article, or at least the name thereof, attracted by the display, bought one of the bottles, with a box of ten capsules, and received printed and illustrated instructions which he had asked for. The user of the bottle was instructed how to discharge from a capsule carbon dioxide, commonly called 'carbonic acid gas,' into a specified quantity of cold liquid in the bottle, so as to aerate the liquid and thus to make it sparkling and effervescent. The plaintiff at his home, after reading and observing the directions, attempted to aerate milk, but failed. He emptied and

corporation. The former is engaged in the manufacture and sale throughout this State of toilet soap, and the latter is doing a mercantile business in the city of Oshkosh. Armour & Co. make and

washed the bottle and put it aside. Three or four days afterwards he employed the process with water. He inserted the rubber washer and the capsule, gave the cap a little turn, inverted the bottle, screwed the cap home, and shook the bottle. Then he placed it on a table, laid his hand on the bottle, and was about to turn away, when the bottle exploded with considerable force, and a part thereof struck one of his eyes and destroyed it. The cause of the explosion is not definitely ascribed. Whether the bottle was broken, cracked, or impaired, whether any of the attachments were imperfect, whether the capsule was overcharged, does not appear. All that we are told is that the plaintiff used the apparatus in accord with the instructions, and after he had gone through with the process and had put the bottle down it exploded. It appears that the bottle, its attachments, and the capsules were made by the American Sparklets Company, of Bridgeport, Conn., and the bottle as sold and the capsules charged were consigned to the defendant and retailed by it.

"Carbonic acid is a gaseous compound of carbon and oxygen, and aerated beverages, like artificial mineral waters, champagne, and beer, are charged with it, and owe their sparkle and effervescence to it. I think that we cannot assume that the sale of an apparatus for such use is the sale of an instrument essentially dangerous, like the belladonna in *Thomas v. Winchester*, 6 N. Y. 397, or the nitric acid in *Farrant v. Barnes*, 2

C. B. N. S. 553. The distinction is made by Hunt, J., in *Loop v. Litchfield*, 42 N. Y. 351, 359:

"Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle, or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger."

"Like the case of the naphtha in *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64-69, the defendant vendor must not be deemed to have known of the danger of this use of carbonic acid gas, if danger there were. On the other hand, there is proof that an apparatus of this principle had been on the market for a considerable period, that this apparatus had been on sale for some months, that there had been many sales and demonstrations thereof, and there is no proof of any previous accident in its use. There was no contention or proof that this particular bottle was peculiarly defective. There is no proof that the process of charging a glass bottle with carbonic acid gas, which generated an initial pressure of about 200 pounds to the square inch, is essentially dangerous. There is no proof that to employ a bottle, if protected with wicker work, is essentially dangerous. The testimony of the plaintiff's expert is that the bottle constructed like the one he had and the sample before him (the broken glass of the exploded bottle) would in his best judgment

sell "Armour & Co.'s Toilet Soap No. 175" as a harmless article for the purpose of use in cleaning the face, hands, and body, and hold out to the public that this soap would supply every need for all

break under the pressure of gas from the capsule; but there is not a line of testimony which ascribes it to the covering of the bottle, in distinction to any other kind of cover.

"In proving the negligence of the defendant in not using reasonable care to discover that the apparatus was unfit for its designated use, the plaintiff cannot rest upon the mere ignorance of the defendant, but must show that the ignorance existed from the absence of due care. Thompson, Com. on Neg., § 829. He cannot ask the jury to speculate, and to guess what the defendant, in the exercise of due care, should have done that would have made it cognizant of the defect. He must indicate to the jury what was the omission of the defendant, to the breach of its obligation to the plaintiff. Shearman & Redfield on Negligence (5th ed.), § 57." * * *

"In consideration of the duty of the vender, it may be borne in mind that the defendant was not the manufacturer. There is evidence, not disputed, that the bottle in which the defect is assigned was furnished to the manufacturer by the Diamond Glass Company for the express purpose of its intended use, and that this company was of very high standing; and there is evidence of various tests made by the manufacturer of the article, greatly in excess of the usual pressure resulting from the discharge of a capsule. There is no evidence that the defendant held itself out as the manufacturer, or that the plaintiff had any reason to suppose that it was such. It

was a druggist, and the plaintiff, who read the printed directions before using the bottle, naturally would have seen the words, 'American Sparklets Company, Bridgeport, Conn., U. S. A.' in large letters. Moreover, we are told that he had heard of the apparatus, or of its name, at least, before he saw the display in the defendant's shop. If the rule were thus extended upon the evidence in this case, no vendor of manufactured articles which might, from some latent defect only revealed by use, be a source of injury to the user, would venture to sell them unless he had first tested each and every one by actual use. It seems to me, then, that as to an article not inherently dangerous we must push the rule too far if we should hold the defendant upon the evidence. In the words of Hunt, J., in *Loop v. Litchfield*, 42 N. Y., at page 361:

"The utmost possible care is not required. Indeed, its exercise would require an extent of time and caution that would terminate half the business of the world."

"See, too, *Kilbride v. Carbon D. & M. Co.*, 201 Pa. St. 552, 51 Atl. 347; *Cramb v. Caledonian R. R. Co.*, 19 Sess. Cases [1891-1892] 1054, cited in *Beven on Neg.* as 19 Rette, 1054; *Beven on Neg.*, pp. 58-64." * * *

See *DAVIS v. GUARNIERI*, 45 Ohio St. 470 (Ohio, 1887), where the official syllabus states the case as follows:

"1. The wife of G. being ill, expressed to her husband a desire for a harmless medicine to the use of which she was accustomed. G.

toilet purposes, and guarantee the purity and harmlessness thereof, and that the soap is free and clear from all harmful ingredients or foreign substances which might injure persons using the same in

called at the drug store of D. for the desired medicine; the agent of the latter, without informing himself by whom or for what it was intended to be used, carelessly put up, sold and delivered to G. a poisonous drug. G. supposing it to be what he had called for, took it home and gave it to his wife, who drank of it in the belief that it was a harmless medicine, and instantly died from its effects. These facts constitute a cause of action against D., in favor of the administrator of the deceased wife for negligently causing her death.

"2. The doctrine of imputed negligence does not prevail in Ohio; and the contributory negligence of a husband in the purchase of a drug to be used by his wife is not to be imputed to her in an action by her or her administrator against the dealer for injury or death resulting from the use of such drug, unless she constituted him her agent; and in simply making known to her husband her desire for the medicine, by reason of which he obtained it, the wife did not constitute him her agent in such sense as that his contributory negligence in making the purchase can be imputed to her.

"3. In an action by the administrator of the deceased wife for the benefit of her surviving husband and children, for wrongfully causing her death, evidence that the husband had again married and that his second wife performed like services and duties and contributed in like manner as the first wife to the support of the family and the accumulation of

property, is not admissible in mitigation of damages.

"4. It is not necessary to allege in the petition in an action for negligently doing an act which resulted in an actionable injury, all the facts which contributed to the primary act complained of, or which tend to establish the negligence of such act.

"5. An averment in a petition that the defendant by his agent negligently put up and sold a poisonous drug instead of a harmless medicine called for, is sufficient to authorize proof that such drug was not labeled 'poison,' as required by statute.

"6. It is not error for the court in the trial of such an action, and in its instructions to the jury, to call attention to a statute making it unlawful to sell a poisonous drug without labeling it 'poison.'

"7. An express finding of a jury by a special verdict upon a particular fact in dispute, which shows that the case does not turn upon such fact, renders the instructions of the court upon the same subject immaterial, unless it appears that such finding is prejudicial, and that the charge may have contributed to the particular finding.

"8. In the trial of a civil action where the preponderance of the proof is to determine the issues, the court or jury deals simply with the probabilities in the case; and where the jury is asked to find specially whether a particular fact exists, and answers, 'probably not,' this is a finding that, for the purposes of the case, the fact does not exist." (*Verdict for plaintiff for \$1,000*).

the ordinary manner. On and prior to September 20, 1906, Armour & Co., its agents, servants, and employees, carelessly and negligently permitted and allowed a cake of the soap so manufactured by it to contain a needle or small round sharp piece of steel embedded therein. This made the use of said soap dangerous and was liable to cause injury to persons using the soap in the ordinary and usual manner. Some time prior to September 20, 1906, Armour & Co. sold and delivered to S. Heymann Company a quantity of this soap, in which was contained the defective piece or cake above described, in which the needle was so concealed as not to be visible to the naked eye. This was purchased by the latter from the former to be sold by the latter to the general public, and with the understanding that the soap was harmless and free from all dangerous particles or ingredients which might or which would injure the body of the person using the same for toilet purposes. Both defendants then jointly caused to be placed upon the market and sold to the general public this soap so negligently made containing this needle, and the plaintiff purchased from S. Heymann Company a quantity of this kind of soap and received the defective cake or piece above described. While properly using the soap so purchased for toilet purposes, the plaintiff was injured by this needle in the soap entering the palm of his right hand and producing the most serious consequences, including paralysis and disability.

The pleader says this injury was sustained by reason of "want of ordinary care and produce of the defendants, their agents, servants, and employees, in manufacturing said soap and putting the same on the market for sale for general use and allowing a sharp piece of needle or steel to become embedded therein which was liable to injure persons using the same in the ordinary and usual manner." Each of the defendants demurred: "1. For that it appears * * * that several causes of action have been improperly united. 2. For that it appears * * * that the complaint does not state facts sufficient to constitute a cause of action against this defendant." The pleader, appellant in this court, begins his brief with this statement: "This is an action in tort founded upon negligence alleged in the complaint set forth at length in the printed case." In the face of this authoritative declaration of the purpose of the pleader, we shall spend no time searching for any other or different intent on his part. The averments of the pleading are appropriate to such declaration.

Before we can determine whether or not two causes of action are improperly united, we must find the two causes of action and then

ascertain whether they are such as may be joined. The complaint avers that both defendants "jointly caused to be placed on the market and to be sold to the general public Armour & Co.'s toilet soap so carelessly and negligently made containing said sharp, round piece of steel or needle." But in the face of express averments in the same pleading that Armour & Co. manufactured the soap and negligently permitted a cake of soap so manufactured by it to contain this needle, that Armour & Co. sold and delivered to its co-defendant quantities of its soap, including a box of soap containing this defective piece or cake of soap, and that the plaintiff purchased from S. Heymann Company, the last-quoted words must be considered a conclusion or inference of the pleader from the specific facts otherwise appearing in the complaint. So with the averment "that the purity and harmlessness (of the soap) was guaranteed by the said defendants, and the same to be free and clear from all foreign substances which might injure the person using the same in the ordinary and usual manner." There being no purchase by the plaintiff from Armour & Co., but the latter having sold to S. Heymann Company, and S. Heymann Company thereafter to the plaintiff, and no joint act of sale or contract by the defendants, and the plaintiff's claiming in tort, this averment must also be deemed a legal inference of the pleader from the facts stated, and it must be considered that the soap was offered to the public successively in the usual manner by each defendant as a harmless and useful toilet article, or that in each successive sale the vendor so represented the soap to his immediate purchaser.

The first inquiry therefore is whether the foregoing pleading states a cause of action for negligence. Negligence in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. This duty may by operation of law arise between persons who by contract bring themselves into certain relations as bailor and bailee, carrier and passenger, master and servant, and others. Or the duty may be imposed independently of contract relations by statute, ordinance, or rule of the common law, and due only to particular persons or classes of persons as users of a highway or other way, abutting owners, fellow travelers on the highway, and others. Or the duty may be due to all persons, as the duty to refrain from acts apparently dangerous to life or limb, as when in play "the fool casteth firebrands and arrows;" or where one exercises a conceded right in a manner apparently and unnecessarily dangerous. The duty is, not to never fail, but not to fail under such circumstances

that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, to one to whom the duty is due. In each of these relations legal duty may vary in kind or in the degree of care required, or the act or omission may vary in the obviousness of its consequences, and therefore legal investigation in order to judge of the quality of the act omitted or improperly performed frequently inquires in what relation the parties to the action stood as to one another. This relation has been termed "privity," and in the law of negligence we find cases asserting and others denying this requirement of privity between the party injured and the party negligent; but, with respect to the breach of a duty due from the defendant to all persons, it must be apparent that no such inquiry is relevant. A manufacturer, dealer, or other person may bring himself, however, into privity with others under exceptional circumstances, and thereby be charged with a duty toward such person different or greater from that which he owes to all persons, as in the case of a purchase by the vendee from the manufacturer or dealer for the use of a third person specially designated to the manufacturer or dealer, as in *George v. Skivington*, L. R. 5 Exch. 1, and *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847; and in the case of implied invitation to servants of another master to use a defective appliance furnished to that master for the use of the latter and his servants, as in *Bright v. Barnett Co.*, 88 Wis. 299, 60 N. W. 418; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, and *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; and in the case of a caterer furnishing a dinner for the use of the master of the feast and the guests of the latter, where one of the guests is injured by the negligence of the caterer in failing to properly prepare or select the food (*Bishop v. Weber*, 139 Mass. 411); and in the case of a manufacturer or vendor of remedies who sells to a dealer, but undertakes by directions or recommendations on or accompanying the package to communicate directly with the consumer or user. (*Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118). But where the manufacturer or vendor had not at the time of the injury brought himself into any privity with the person injured within the rule of the foregoing cases or similar and analogous circumstances, the duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally. There is no privity, no particular relation carrying with it special duties or a special degree of care in such case.

Standard Oil Co. *v.* Murray, 119 Fed. 572, 57 C. C. A. 1; Salmon *v.* Libby et al., 114 Ill. App. 258; McCaffrey *v.* Mossberg & Co., 23 R. I. 381, 50 Atl. 651; Bragdon *v.* Perkins, Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 5 Am. Neg. Rep. 277; Zieman *v.* Kieckhefer E. M. Co., 90 Wis. 497, 63 N. W. 1021; Loop *v.* Litchfield, 42 N. Y. 351. The cases are collected in Huset *v.* Threshing M. Co., 120 Fed. 865, 57 C. C. A. 237, and the rule well stated from the viewpoint that no duty rests upon the manufacturer and seller to dealers, in favor of the purchaser from the latter, with certain specified exceptions.

The manufacturer or dealer who puts out, sells, and delivers, without notice to others of its dangerous qualities, an article which invites a certain use, and which article is not inherently dangerous, but which by reason of negligent construction he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated. So a manufacturer or vender putting out and selling articles inherently dangerous, such as explosives or poisons, without notice to others of their dangerous nature or qualities, or with a misleading notice or negligently in any other way, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. So a manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise of ordinary care. The reason for these rules is apparent. The manufacturer or vendor should have no immunity from duties common to all merely because he is a manufacturer or vendor. At the same time there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of nonliability. If a general rule of statute or common law requires him to take precautions to protect the public against a dangerous substance by proper designation of the thing manufactured or sold, he owes a duty to the public so to do, and for failure in that regard he is liable for the consequences reasonably to be anticipated. In *Ives v. Welden*, 114 Iowa, 476, 87 N. W. 408, 10 Am. Neg. Rep. 590,

this duty was imposed by statute; in *Thomas v. Winchester*, 6 N. Y. 397, by common law.

We must assume upon this pleading that the needle was not knowingly placed in the soap by the manufacturer, and that the soap was sold by the manufacturer to the dealer without knowledge that it contained this needle. There is in some sense an implied invitation to use the soap for toilet purposes, but no knowledge or reasonable means of knowledge from the ordinary composition of the product, or from anything brought to the notice of the manufacturer, that such use would be dangerous. A guaranty or warranty not knowingly false or fraudulent does not affect the liability in tort for negligence. The unintentional and negligent dropping of a needle into the mixture is a remote possibility, an extraordinary occurrence, and serious injury resulting from such act to persons using the soap for toilet purposes is an unusual and remote consequence of the careless dropping of such needle into the mixture. There are, no doubt, well-authenticated instances of severe illness and even death resulting from a puncture or scratch by a needle or a pin; but these are not ordinary consequences of such accidents, but are extraordinary, unusual, and remote consequences, which a person of ordinary prudence and discretion standing in this relation to the user or purchaser is not expected to foresee and provide against. "Negligence in the law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonable and probable result thereof." *Johnson v. Webster Mfg. Co.* (opinion filed April 20, 1909), 120 N. W. 832 (3). Another defi-

3. *JOHANSON v. WEBSTER MANUFACTURING Co.*, (*Wisconsin*, April, 1909) 120 N. W. 832, was an action for damages for injuries sustained by an employee. There was a judgment for plaintiff in the Superior Court, Douglas county, from which defendant appealed. On appeal judgment was *reversed*. The facts are stated by DODGE, J., as follows:

"The evidence tended to show that plaintiff, a woman of ordinary intelligence, thirty-seven years of age, had been at work for the defendant for a period of seven years, with some intervals, at painting chairs in a room where

several other men and women were engaged in similar work. Benzine was used copiously in the process. A closed tank or barrel thereof was located in one corner of the room from which the operatives were accustomed to fill open pails which stood in different parts of the room; the benzine being used to thin the paint, wash brushes, and also the hands of the operatives, as they needed, and was continuously being spilled in greater or less quantities about the room. The day of the injury complained of plaintiff had filled a pail situated near her place of work,

nition is that "negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it." *Kendrick v. Towie*, 60 Mich. 363, 367, 27 N. W. 567; *Texas & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162; *Hope v. Fall Brook Coal Co.*, 3 App. Div. 70, 38 N. Y. Supp. 1040; *Webb's Pollock on Torts* (Am. Ed.), pp. 29, 30, and cases in notes.

There was therefore in the instant case no breach of a duty imposed by law on the manufacturer for the protection of the public,

and at evening, just before six o'clock, she had been washing her hands at that pail, and benzine was scattered about on the floor. As plaintiff was drying her hands, a fire suddenly started at her feet and flamed up, ignited her clothing and burned her severely. She gave somewhat vague testimony of a sound resembling the scratching of a match under or near her foot at the moment the flames started. There was no rule against the employees having matches in their possession, nor evidence that any of them ever did so. There was a rule prohibiting smoking on the premises, which was, so far as appears, uniformly obeyed. Plaintiff professed entire ignorance as to inflammability of benzine. The jury found a special verdict: 1. Plaintiff was injured as she claims. 2. Defendant did not exercise ordinary care in the way of furnishing plaintiff a safe place to work, considering the character of the work. 3. Such want of ordinary care was the proximate cause of the accident. 4. Ordinary care required defendant to promulgate among its employees a rule or regulation forbidding the taking of matches within the premises in question. 5. It was lack of ordinary care not to do so and was proximate cause of the accident. 6. The fire was

caused by plaintiff's stepping upon and igniting the match. 7. Plaintiff was not chargeable with contributory negligence."

On the question of negligence and contributory negligence, the court said:

"Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof. *Compt v. Starke D. & D. Co.*, 129 Wis. 622, 625, 109 N. W. 650. Now, if the act of permitting employees to scatter benzine promiscuously about the workroom is negligence as above defined, what can be said of the act of the employee who in fact scatters it? Is the latter act any less careless than the former or any less likely to cause injury within the anticipation of an ordinarily prudent person? Surely not. But the evidence is undisputed that the presence of benzine at the place of ignition occurred by plaintiff's own act, that she brought it in an open vessel from the storage barrel, and that she was responsible for scattering it about and onto the floor. In other words, that she voluntarily did the specific act which defendant at most merely tacitly permitted."

or for the protection of the vendee of his vendee, no actionable negligence shown. Consequently the plaintiff has failed to state a cause of action against the defendant Armour & Co.

With reference to the S. Heymann Company, there is no negligence charged in the complaint. The needle was so embedded in the soap as to be invisible to the naked eye. Heymann Company did not know of its presence in the soap. In the exercise of ordinary care, it could not have been ascertained that the needle was in the soap. This needle happened in the soap through no omission or default of theirs. They consequently are not holden to the plaintiff upon any ground of negligence.

The order sustaining the demurrer is affirmed.

DODGE and BARNES, JJ., dissent.

CITY OF WINONA v. BOTZET.

CITY OF WINONA v. NICHOLS.

United States Circuit Court of Appeals, Eighth Circuit, March, 1909.

1. MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTIONS—"TIME WHISTLE" BLOWN FOR CITY EMPLOYEES—HORSE FRIGHTENED—CITY LIABLE FOR INJURY.—The city of Winona maintained a shrill, startling steam whistle on its water works building within 110 feet of its bridge across the Mississippi river, which was forty feet in height at that point. This whistle was connected with its fire-alarm system, so that it gave notice automatically by its blasts of fires and their location when an alarm was sent in. The city directed the engineer of its water works to blow this whistle daily by hand at five P. M. to give notice to union men and its employees of the end of their day's work. There was substantial evidence that the blasts from this whistle had frightened horses traveling on the bridge for years before this accident. As Nichols was driving his horses over the bridge at a point about 110 feet from the whistle at five P. M., the assistant engineer of the water works blew a blast of the whistle which frightened his horses, caused them to run away, to throw him and a girl who was riding with him to the ground below, and to kill him and injure her (1).

1. See the following cases relating to injuries caused by horses being frightened by various objects:

Telephone reel on highway.—In SIMONDS v. MAINE TELEPHONE & TELEGRAPH Co., (Maine, November, 1908) 72 Atl. 175, action on the case

to recover damages for personal injuries sustained by the plaintiff and caused by an alleged obstruction, consisting of a large reel containing 'new bright telephone cable,' placed by the defendant in Main street, Madison village, and thereby con-

Held:

- 1 The whistle was not blown in the exercise of the city's power to protect itself and its inhabitants against fires, but in the exercise of its power to maintain water works and to care for its own property.

stituting an alleged nuisance, whereby the plaintiff's horse became frightened and ran away, and the plaintiff was thrown out of his wagon and injured, plaintiff recovered a verdict for \$695.25, and the defendant then filed a general motion for a new trial. Defendant's motion *sustained*. The opinion was rendered by EMERY, CH. J., the points decided being stated in the official syllabus as follows:

"1 Authority given by a municipality to a telephone company to erect and maintain telephone poles and wires on its streets carries with it the right to use at needful places on the streets suitable appliances for such erection and maintenance.

"2. Such appliances at such places on the streets, though they are likely to frighten well-broken horses carefully driven, are not nuisances *per se*.

"3. A reel three feet long and four feet in diameter, with lead pipe coiled upon it, and placed next the sidewalk in the line of telephone poles, for the present purpose of stringing the pipe on the poles to inclose telephone wires, and leaving ample room for the travel along the street, is not shown to be an unsuitable appliance or in a needless place, and so is not a nuisance, though so placed it is likely to frighten well-broken horses carefully driven.

"4. Owners and drivers of horses have no monopoly of the public streets, and must accustom their horses to the appearance of, at least, such inert objects as are lawfully thereon."

Railroad whistle. — In *BRININSTOOL v. MICHIGAN UNITED RAILWAYS CO.*, (*Michigan*, June, 1909) 121 N. W.

728, judgment for plaintiff in the Circuit Court, Calhoun county, was *reversed* on the ground of error in instructions on damages. The opinion was rendered by OSTRANDER, J., who stated the facts as follows:

"The plaintiff, driving a team of horses in the highway, adjoining the track of the defendant's railway, was thrown from the wagon and injured. The team was frightened; the wagon and harness broken. He alleges in his declaration: 'The said defendant, by its agents, servants, and employees again sounded said whistle, without any reason or cause therefor, a large number of times, for the express purpose of frightening said team, and of injuring said plaintiff; that at the time said whistle was sounded as aforesaid, said car was not approaching any crossing nearer than one and one-half miles from the point where said whistle was sounded, and there was no reason whatever for the said defendant, by its said servants, agents, and employees, to sound said whistle; that the said defendant its agents, servants, and employees then and there well knew, at the time said whistle was sounded as aforesaid, that said plaintiff's team was frightened, and liable to run away on account of the repeated sounding of said whistle, yet the said defendant, by its agents, servants, and employees, disregarding its duty as aforesaid, wilfully, maliciously, wantonly, and negligently continued to sound said whistle after it, the said defendant, its agents, servants, and employees, well knew that the plaintiff's said team was being frightened by said whistle and the passing of said car and did not stop, or attempt

2. There was substantial evidence that it failed to discharge its duty to so use its property as to do no unnecessary damage to others, and its duty to use reasonable care to keep its bridge reasonably safe for travelers.

to stop, said car or cease to sound said whistle until said team of said plaintiff was so frightened that it was impossible for said plaintiff to control and manage said team.'

"In the second count of the declaration, a careless and negligent sounding of the whistle, frightening plaintiff's team and causing his injury, is alleged." * * *

The court said: "It is one of the contentions of the defendant-appellant, that a verdict for defendant should have been directed, for the reason that the testimony for the plaintiff tended to prove a malicious and wilful, as opposed to a negligent and careless, use of the whistle; that it did not tend to prove a negligent and careless use of the whistle. It is true that the testimony for the plaintiff (no testimony upon this subject was offered by defendant) tended to prove there was no apparent necessity for such sounding of the whistle as was alleged and proven, and witnesses were permitted to testify, on cross-examination, that they thought the motorman sounded the whistle to make the horses jump. It cannot be said, however, as matter of law, that the testimony did not tend to prove a negligent use of the whistle, as opposed to a malicious and a wanton use of it. It was not error to submit the case to the jury upon the theory of defendant's responsibility for the careless and negligent use of the whistle; and as the instructions upon the subject of wilful and malicious use were agreeable with defendant's contention, it must be assumed that the jury found the negligence of the motorman, and not his wilfulness, was responsible for the fright of the team. It is therefore unnecessary to

enter upon the subject of the responsibility of the defendant for the wilful or the malicious conduct of the motorman." * * *

After reviewing the evidence as to the injuries sustained by plaintiff, the court, discussing the rule as to damages, said:

"It is the generally accepted rule that to entitle a plaintiff to recover damages presently for apprehended future consequences of an injury there must be such a degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury. *Strohm v. New York, etc., R. R. Co.*, 96 N. Y. 305; *Briggs v. N. Y., etc., R. R. Co.*, 177 N. Y. 59, 69, N. E. 223, 15 Am. Neg. Rep. 396. See *Collins v. City of Janesville*, 99 Wis. 464, 75 N. W. 88. (See also 4 Am. Neg. Rep. 100, 10 Am. Neg. Rep. 520, 107 Wis. 436, 111 Wis. 348). If one of the consequences of an injury is a permanent impairment of the nervous system, it should be considered by the jury in estimating damages. If a more serious nervous disorder than is presently shown is a reasonably certain future consequence of the injury, and is expected, evidence upon the subject should be received. The charge to the jury did not limit or modify the effect of the testimony, or confine the jury to the question of the probable results of the injury to the head. The testimony was all of it permitted to stand for consideration, and as it is obvious that some of it is speculative, and refers to possible consequences and to disorders liable to occur; and as a substantial verdict was returned by the jury, we feel obliged to reverse the judgment, and to order a new trial."

2. NEGLIGENCE—EVIDENCE OF PRIOR SIMILAR ACCIDENTS

COMPETENT.—In an action for damages caused by frightening horses on a highway by the blast of a whistle, evidence that tractable and gentle horses had been frightened previously by blasts of the same whistle under similar circumstances was competent.

Bright colored cloths on team of horses.—In *PATTON-WORSHAM DRUG CO. v. DRENNON*, (*Texas Civil Appeals*, December, 1909) 123 S. W. 705, judgment for plaintiff in the District Court, Bexar county, was *affirmed*, the court (per NEILL, J.) stating the case as follows:

"This suit was brought by Drennon against the Patton-Worsham Drug Company to recover damages for personal injuries inflicted on his wife by said company.

"After alleging that on March 13, 1906, the relation of principal and agent or master and servant existed between the defendant and one J. R. Lowry, and that on said day, while, as such agent, Lowry was in and about his master's business and within the scope of his agency, the plaintiff's petition proceeds as follows: 'Second. (a) That heretofore on or about the thirteenth day of March, 1906, plaintiff's wife was driving a horse to a buggy along a street over which many horses were driven in the city of San Antonio, Bexar county, Tex., and the horse came within view of a team of horses which said Lowry was driving to a wagon. (b) That the team of horses were decorated with cloths upon which were various letters in bright colors, and such team of horses so decorated were well calculated to frighten horses driven by persons upon such streets, and which was known, and ought to have been known, by said Lowry in the exercise of ordinary care, and the team so decorated caused the horse to be frightened and to upset the buggy, and plaintiff's wife was

thrown to the earth and thereby received injuries.' Then follow allegations as to the character, nature, and extent of her injuries. 'Fifth. That said Lowry knew, and ought to have known, the facts set out in subparagraph "a" of paragraph second; and by reason of same foresaw, and ought to have foreseen, that there was a possibility of loss being caused to some one by driving such a team on such a street; and by reason of such foresight he ought not to have done so, which he knew and ought to have known.' The petition then averred that such conduct was the proximate cause of plaintiff's damages, and closes with a prayer for damages against defendant for the sum of \$20,000. The defendant answered with a general demurrer, and what is termed by its counsel in their brief a special exception, a general denial, and a special plea denying that Lowry was its servant or agent, but that, on the contrary, he was an independent contractor. The demurrer and exception to plaintiff's petition were overruled, and the trial of the case resulted in a verdict and judgment for plaintiff in the sum of \$1,000."

The court held that: "The evidence is reasonably sufficient to show that the defendant, acting through and by its agent and servant, J. R. Lowry, was guilty of negligence in the manner and form alleged by plaintiff, and that by reason of such negligence his wife was thrown from her buggy and badly hurt, whereby the plaintiff was damaged in the amount assessed by the jury." Rehearing denied, January 5, 1910.

3. **NEGLIGENCE—QUESTION FOR JURY.**—It is only when the material facts and the rational inferences from them are so clearly established that but one finding would be sustained by the court that the question of the negligence of the defendant is for the court. Evidence considered, and *held* sufficient for the consideration of the jury.

4. **NEGLIGENCE—"PROXIMATE CAUSE"—"INTERVENING CAUSE."**—The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, and which in the natural and probable sequence of events, without the intervention of any new and independent cause, produces the injury.

The intervening cause which will relieve of liability for an injury is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and which could not have been reasonably anticipated.

The blast of a whistle frightened horses on a bridge, they ran, the tugs came unhooked, the tongue slipped from the yoke, fell to the bridge and broke, the wagon box crashed against the railing, threw the occupants over it to the ground, and injured them.

Held:

The blast whistle was the proximate cause of the injuries, and the subsequent events preceding the injuries, were dependent upon and caused by it.

5. **ASSUMPTION OF RISK—KNOWLEDGE AND APPRECIATION OF THE DANGER ESSENTIAL.**—Notice or knowledge and appreciation of the danger are indispensable to an assumption of the risk of it.

6. **CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION.**—The burden of proof to establish the contributory negligence of the plaintiff is upon the defendant. It is only when the evidence of it is so clear that the court would not sustain a finding to the contrary that it is the duty of the court to instruct the jury that the plaintiff was guilty of it. Evidence considered and held for jury.

7. **IMPUTED NEGLIGENCE—DRIVER'S NEGLIGENCE NOT IMPUTED TO PASSENGER.**—The negligence of the driver of a vehicle may not be imputed to a passenger who is riding with him without charge or compensation.

8. **MUNICIPAL CORPORATIONS—BRIDGES—DUTY TO KEEP BRIDGE SAFE.**—The duty of a city to exercise reasonable care to keep its bridge or street reasonably safe for travelers is not limited to acts of commission and omission within the limits of the bridge or street, but extends to those outside the bridge or street that render it unsafe for travelers. The duty to so use its own property as to do no unnecessary injury to others extends to effects produced by the use beyond the limits of its property.

9. **BRIDGES—DAMAGES—INJURIES TO PERSONS AND PROPERTY.**—Damages sustained by injuries to persons as well as to property are recoverable for a breach of these duties.

10. NUISANCE—PUBLIC NUISANCE.—Where the use and enjoyment of a legislative grant does not necessarily and naturally create a nuisance, but the nuisance results from the method of the use and enjoyment, the grant is no defense to an action on account of the creation or continuance of the nuisance or its effects.
11. MUNICIPAL CORPORATIONS—GOVERNMENTAL AND PRIVATE OR CORPORATE POWERS—"PUBLIC POWERS"—"PRIVATE POWERS."—Municipalities have two classes of power, the one political, public, in the exercise of which they govern their people and act as delegates of the State, the other private, business, in the exercise of which they act for the advantage of their inhabitants and themselves. They are not liable for damages for the acts and omissions of their officers and agents in the exercise of the former. But they are liable for damages for the wrongful and negligent acts and omissions of their officers and agents within the scope of their authority in the exercise of the latter.
12. MUNICIPAL CORPORATIONS—POWER TO CONSTRUCT AND MAINTAIN WATER WORKS A BUSINESS POWER.—The municipal power to construct, maintain, and operate water works is a private or business power, and a city is liable for damages caused by the wrongful or negligent acts and omissions of its officers and agents in the exercise of that power to the same extent as a private corporation or individual.

(Syllabus by the Court.)

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

At five o'clock in the afternoon of a cold blustering day in January, 1907, the assistant of the engineer of the water works of the city of Winona blew a steam whistle on the water works building for the purpose of notifying union men and city employees that their work-day was over, and thereby scared a team of horses which James N. Nichols was driving about 110 feet distant from the whistle over the city's bridge across the Mississippi river, so that they ran away, threw him and Irene Botzet, a schoolgirl thirteen years old who was riding with him, over the railing of the bridge to the frozen ground forty feet below, killed him, and seriously injured her. Mary Alice Nichols, the administratrix of his estate, brought an action against the city for alleged negligence in causing the death of Mr. Nichols in this way. August Botzet, the father of Irene, brought an action against the city for alleged negligence in causing the injuries to her. The two causes were tried together, and resulted in judgment for the plaintiff, of which the city complains.

For more than twenty years the city of Winona has maintained water works, and as a part thereof a building in which the pumping engines are located and operated. It has also maintained an organ-

ized fire department under legislative authority. In 1888, under the authority, it installed an electric fire-alarm system, and as a part of it a twelve-inch fire whistle, which is placed on the roof of the water works building, and which automatically notified the members of the fire department and others by its blast in that part of the city a fire was whenever an alarm was sent in from any one of some sixty fire-alarm boxes scattered throughout the city. This whistle, including the fire-alarm system, was tested three times a day, so that it gave forth many blasts, sometimes about 100 in a day. After this whistle and fire-alarm system had been established, and in 1891, the city of Winona, under authority conferred upon it by the Legislatures of Minnesota and Wisconsin, constructed and has maintained ever since a toll bridge across the Mississippi river for the use of pedestrians, teams, and carriages. It constructed this bridge in such a way that the driveway of the approach to it upon the Minnesota side started on an easy ascent at the intersection of Second and Main streets in Winona, ran north on Main street about 400 feet, then turned and ran west one block of 300 feet to Johnson street, where it was at least forty-five feet above the ground. At that point the driveway turned and ran east across the river above 300 feet to a point where it connected with a pile bridge and a road leading across the Wisconsin bottoms. Where the roadway turned east on the Minnesota side it was not more than 110 feet distant from the steam whistle on the water works building, which was in a plane not more than fifteen feet below it. The roadway of the bridge was provided with a sidewalk on one side of it six feet in width, a driveway for carriages eighteen feet in width and substantial wooden railings four feet two inches in height.

In May, 1905, the city council of Winona, on a petition of the trade and labor council, adopted a recommendation of its fire committee that this fire whistle should be blown at five in the afternoon to notify mechanics and others when their workday ceased. Thereupon the water commissioner directed the engineer of the water works to blow this whistle at that hour each day, and he did so by means of a cord attached to the valve from that time until the injuries were inflicted which resulted in these actions.

By chapter 165, p. 238 of the General Laws of Minnesota, 1903, the management of the water works was transferred on May 1, 1906, to the board of municipal works of the city of Winona; but that board gave no directions concerning the blowing of this whistle, and the engineer who continued in charge of the water works building continued to blow the whistle as before.

The blast of this whistle was produced by a steam pressure of about 100 pounds to the square inch, and it sent forth a shrill, startling sound which could be heard five miles, and much farther under favorable conditions. In the discharge of its function as a fire whistle it was blown automatically by the action of the fire-alarm system. But in the discharge of its function as a time whistle it was blown by hand by the engineer of the water works, or his assistant, who pulled the valve open by means of a cord attached to it. Gentle and tractable horses had been scared by the blasts of this whistle and had attempted to run away while they were traveling upon the bridge, and this had occurred many times during the preceding nine years. Mr. Nichols was a dairyman who lived about twelve miles distant from Winona in the State of Wisconsin, and who had been accustomed for four years to drive over the bridge once a week and sometimes more frequently, so that he probably knew that the whistle sounded for fire alarms; but the evidence does not indicate whether or not he was aware that it blew at five in the afternoon. He drove into Winona on the morning of the day of the accident a pair of young horses, four or five years old, and started to return about five o'clock in the afternoon. Irene Botzet, a schoolgirl who lived in Wisconsin and attended school in Winona, asked him for a ride across the bridge, and he granted her request. As he drove up the approach of the bridge, toward the turn near the whistle, he was holding his horses down to a slow walk so that another team walked past him. There were then two teams in front of him on the bridge, and he was following. Just after he arrived at the turn of the driveway to the east the steam whistle blew, and his team, and that next in front of him, began to run. He held onto his horses and guided them past the two teams in front of him, but one, and a little later two more, of the tugs in his harness unhooked, the end of the tongue slipped out of the yoke, dropped, and broke, the horses ran on, drove the end of the broken tongue against the guard rail, raised the box on which the occupants were sitting, and threw them over the railing to the frozen ground on the Wisconsin side forty feet below. The court submitted to the jury the questions: Was the city guilty of negligence which was the proximate cause of the injuries inflicted by the runaway, and were the victims guilty of negligence which contributed to cause these injuries? and the jury answered the former in the affirmative, and the latter in the negative.

W. J. SMITH (RICHARD A. RANDALL and TAWNEY, SMITH & TAWNEY, on the brief), for plaintiff in error.

EDWARD LEES and M. J. FUGINA (M. B. WEBBER, on the brief), for defendants in error.

Before SANBORN, VAN DEVANTER, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). — The city of Winona is a municipal corporation created, endowed with its powers, and charged with its duties by the Legislature of the State of Minnesota. The character and the limits of the powers and liabilities of such corporations are questions of local law, upon which the decisions of the highest judicial tribunals of the States which create them are authoritative in the national courts, because these questions are determinable by the construction of the constitutions and statutes of the States under which the municipalities are organized. *Detroit v. Osborne* 135 U. S. 492, 499, 10 Sup. Ct. 1012; *Claiborne County v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489; *Madden v. Lancaster County*, 12 C. C. A. 566, 570, 65 Fed. 188, 192; *Blaylock v. Incorporated Town of Muskogee*, 54 C. C. A. 639, 640, 117 Fed. 125, 126. So far, therefore, as the Supreme Court of Minnesota has decided the extent of the powers and liabilities of municipal corporations, those decisions must control in this case. The opinion of other courts become immaterial, and it will be unnecessary to notice or consider them.

Under the decisions of the Supreme Court of Minnesota municipal corporations are charged with the duty to exercise ordinary care to make and to keep their roads, streets, and public ways reasonably safe for travelers thereon, and also with the duty to exercise reasonable care to so use their property and rights as to inflict no unnecessary injury upon persons or upon their property. *Shattle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284); *Blyhl v. Village of Waterville*, 57 Minn. 115, 58 N. W. 817; *Wiltse v. City of Red Wing*, 99 Minn. 255, 260, 109 N. W. 114.

The bridge across the Mississippi river on which this accident occurred is a public highway, and the city of Winona is liable for negligence in its maintenance and care to the same extent as it is for negligence in the care and maintenance of its public streets. *Willis v. Winona City*, 59 Minn. 27, 60 N. W. 814. With these established rules in mind, let us consider the complaints concerning the trial of these cases.

The first specification of error presented is that the court received in evidence the petition of the Trades and Labor Assembly that the fire whistle be blown daily at five in the afternoon, the action of the city council of the defendant in May, 1905, granting that petition, and the curfew ordinance passed in January, 1906, whereby the engineer of the water works was directed to designate nine in the afternoon each day by nine short blasts of the whistle, and the argu-

ment is that, inasmuch as on May 1, 1906, the management of the water works building passed to the board of municipal works, the water commissioner, who in May, 1905, directed the engineer to comply with the order of the council, then went out of his office, and the board never gave the engineer any direction on the subject thereafter, these Acts of the common council were immaterial. But the question at issue was: Did the city exercise ordinary care to keep the bridge reasonably safe for travelers, and to use its water works and steam whistle so as to inflict no unnecessary injury upon the persons or property of travelers over the bridge? The Acts of the council which were introduced in evidence clearly indicated the degree of care the city was exercising in the use of this whistle, and for that reason they were not immaterial. Again the Act of the city council which directed the blowing of the whistle at five in the afternoon unquestionably gave the engineer the authority and the direction of the city of Winona to blow it at that hour until that authority was revoked or an inconsistent instruction was given to him by the city. The same engineer remained in charge of the water works building and of the whistle after the control of them was transferred to the board of municipal works, and he undoubtedly had the same authority to blow the whistle thereafter that he had to continue to run the engines and to pump the water through the city. His authority continued until it was revoked. Moreover, this action of the council in connection with the continued blowing of the whistle subsequent to May 1, 1906, was competent and persuasive evidence of the alleged negligence of the board of municipal works, for the board must have been aware that the whistle was being blown after it came into control of the water works, and it did not stop it, and by the express terms of the Act under which it was created the city is liable for its acts of commission and omission within the scope of its authority. Gen. Laws Minn. 1903, p. 241, § 165; *Kleopfert v. City of Minneapolis*, 90 Minn. 158, 14 Am. Neg. Rep. 381, 95 N. W. 908; *Barnes v. District of Columbia*, 91 U. S. 540, 545, 551; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 Sup. Ct. 990. There was no error in the admission of the Acts of the city council.

It is assigned as error that the court permitted the introduction in evidence of testimony that other horses of ordinary gentleness and tractability were frightened while traveling over this bridge by the blasts of this steam whistle at various times during nine years preceding the accident in question. The reasons urged in support of this specification of error are: 1. That Nichols' horses were frightened by a single blast of the whistle, five seconds in duration, while

the horses of the witnesses were scared by several blasts in quick succession caused by the automatic action of the fire-alarm system, but it was evidently the first sudden sound that tended to frighten the horses far more than its subsequent repetition; 2, that the first blast is not at its commencement as loud as it becomes later, because there is at first stationary steam in the pipe which must be started forth, but there could have been no very substantial difference in the blasts on that account, because the steam pressure was constantly from eighty-five to 119 pounds to the square inch, and that pressure necessarily must have produced almost instant action and sound when the valve was released; and, 3, because the defendant was charged with liability for the effect of the blast which it directly caused, so that this evidence was not necessary or competent to prove notice to the city of its dangerous character, and because this evidence introduced a collateral issue. But the main issue of this case was whether or not the blasts of this whistle were of such a character that a person of ordinary intelligence and prudence would have anticipated the frightening of horses traveling upon the bridge, and their flights as the natural and probable effect of the blast. If these blasts were of this character, the production of them was actionable negligence; if they were not, it was not actionable negligence to make them. There were but two ways in which that question could be determined. It must be determined by the opinion or speculations of witnesses, or by the experience of those who had actually tried it. The latter is certainly more persuasive and convincing and more likely to accord with the facts than the former. The material conditions under which the horses of the witnesses were frightened were substantially the same as those under which the accident happened. They were scared while they were traveling upon the same bridge upon which the horses of Nichols were frightened. They were terrified by the same whistle located in the same place at the same distance from the bridge, and the testimony of the witnesses who were driving or observing these animals that gentle and tractable horses had been frightened while they were traveling upon this bridge by the blasts of this whistle at various times preceding the accident was upon both reason and authority material and persuasive evidence that these blasts were of a character likely to frighten horses under such circumstances, that their fright and flight were natural and probable consequences of the production of the blasts, and that these facts were so notorious that they might be considered by the jury to constitute notice to the city of the dangerous character and probable effects of the blowing of this whistle. *Darling v. West-*

moreland, 52 N. H. 401; *Nye v. Dibley*, 88 Minn. 465, 93 N. W. 324; *District of Columbia v. Armes*, 107 U. S. 519, 525, 2 Sup. Ct. 840; *C. & N. W. Ry. Co. v. Netolicky*, 14 C. C. A. 615, 622, 67 Fed. 665, 672; *Wigmore on Evidence*, § 458, subd. 2; *Chicago G. W. Ry. Co. v. McDonough*, 161 Fed. 657, 667, 88 C. C. A. 517.

Counsel for the city argue that the refusal of the court to instruct the jury to return a verdict in its favor was error. 1. Because there was no lack of care in the construction and the maintenance of the bridge, and the city was not liable for injuries caused by its acts of commission or omission outside of that structure; 2, because the whistle was blown for a governmental and not for a private or corporate purpose, and the city is exempt from liability for acts so done and the rights of the injured were not thereby infringed; 3, because the location and the use of the whistle were discretionary with the city, and the exercise of that discretion was not reviewable by the courts; 4, because the act of blowing the whistle to indicate the time of day was beyond the corporate power of the city; 5, because there was no evidence of the city's negligence, or that its negligence was the proximate cause of the injury, and the persons injured assumed the risk of the blast of the whistle; and, 6, because Nichols was guilty of contributory negligence, in that his whiffletree hooks were not in such a condition that they prevented the tugs from becoming unhooked while his horses were running away.

It is only when the material facts and the rational inferences from them are so clearly established that but one finding from them would be sustained by the court that the duty is imposed upon it to withdraw the question of the causal negligence of a defendant from the jury. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417, 12 Am. Neg. Cas. 659, 12 Sup. Ct. 679; *Chicago G. W. Ry. Co. v. Price*, 38 C. C. A. 239, 243, 97 Fed. 423, 427. Ten witnesses testified to thirteen occasions within nine years preceding this accident upon which gentle and tractable horses upon this bridge, near the turn where Nichols was when the whistle blew, had been frightened by blasts of this whistle, and had jumped or run or turned around. One witness testified that his horse was so terrified that he jumped and broke the shafts of his buggy, another that his horses were so scared that they ran and tore the yoke near the tongue and broke a strap from the evener, still another that his horses were so frightened that they ran and caused a tug to unhitch, and another still that his horses were so terrified that they ran while he was driving them so that they threw his wife out of his wagon and injured her. At the time of this accident Losinski was driving the leading team across the

bridge, Duff the second team, and Nichols was either holding his team stationary or at a slow walk very near the turn of the bridge when the whistle blew. Losinski testified that his horses immediately jumped and became frightened, but he held them. Duff testified that Nichols stopped his horses near the turn to let him pass, that he passed Nichols, that the latter's horses were then quiet, that just after he passed him the whistle blew, that the moment it blew both teams were on the dead run, that his horses were gentle, but they were frightened, ran, and jumped and nearly got away. This was substantial and persuasive evidence that the blowing of this whistle was likely to frighten horses passing it on the bridge, that it rendered the bridge unsafe for drivers of teams thereon, and that, in the light of the evidence that the sound it gave forth was shrill, startling, "awful loud," and could be heard from five to ten miles, this fact was so notorious that a jury was warranted in finding that it must have been known to the city, and that a person of ordinary prudence and intelligence would have anticipated as its natural and probable result the fright and flight of passing horses and serious injuries to those who should be drawn by them.

Nor can the contention be sustained that the unhooking of the tugs, the breaking of the pole, or any of the other events between the blowing of the whistle and the injuries and death was, and the blast of the whistle was not, the proximate cause of those dire effects. The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated. *Union Pac. Ry. Co. v. Callaghan*, 6 C. C. A. 205, 210, 56 Fed. 988, 993, 994; *Cole v. German Savings & Loan Soc.*, 59 C. C. A. 593, 597, 600, 14 Am. Neg. Rep. 676, 124 Fed. 113, 117, 120. The blast of the whistle was the primary moving cause without which the accident would not have happened. It was the cause which set in motion all the other events, the cause which set the horses into a dead run, made them uncontrollable, brought about the unhooking of the tugs, the breaking of the pole, the crash of the wagon against the railing, and the throwing of its occupants to the ground below. All these intermediate acts were dependent, not in-

dependent, causes. They were mere links in the chain of causation between the blowing of the whistle and the injuries and death it produced and were themselves caused by the blast of the whistle.

There is a statement in the brief that Nichols and Irene Botzet knew that the whistle was blown daily at five in the afternoon and that they assumed the risk of injury from it. The place in the record where the evidence that they had this knowledge may be found is not pointed out, and a search of the record for it has proven vain. The transcript, however, does show that Irene testified that she did not know that the whistle blew at five o'clock, and that just as Nichols was approaching the turn of the bridge nearest to the whistle a few seconds before five o'clock he held his horses to a walk while Losinski passed him, and then stopped them very near the turn while Duff passed him, and then it was five o'clock, the whistle blew, the two rear teams ran instantly, and the injuries and death followed. It is difficult to believe that Nichols would have walked and then stopped his horses at the most dangerous place on the bridge at five o'clock in the afternoon if he had known that the whistle blew daily at that hour, when he might just as easily have driven them on and been a few hundred feet distant when the blast came.

Notice or knowledge and appreciation of the danger are indispensable to the assumption of the risk of it (*Chicago G. W. Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239, 247), and the evidence that the victims of this accident knew and appreciated the danger from the blast of the whistle was far from being so conclusive that it was the duty of the court to instruct the jury that they assumed the risk of it.

The burden was upon the defendant to prove contributory negligence, and it was the duty of the court to instruct the jury that Nichols and Irene were guilty of it, only in case the evidence of it was so clear that the court would not sustain a finding to the contrary. The evidence upon this subject was the testimony of one witness who said that some days before the accident he rode with Nichols behind the team which ran away, and they were hitched up so loosely that he was of the opinion that Nichols was negligent in that regard; the testimony of Losinski that when Nichols' horses had run ahead of him three or four rods he saw that one of his tugs was unhooked and one was hooked; the established fact that at some time during the run all but one of the tugs became unhooked; the testimony of two witnesses that they were of the opinion that if three tugs became unhooked at the same time the horses could not have been properly hooked up; and the testimony of the livery man,

who unhitched the horses when they came into Winona and assisted Nichols to hitch them up when they started out of Winona on the day of the accident, that they were properly hitched up when they came in and when they went out; that the hooks, the harnesses and the straps were strong and right, and that the horses were so hitched up that the tongue of the sled could not slip out of the yoke. Since it does not appear that Nichols knew that the whistle was to blow at five in the afternoon, no duty was imposed upon him to so harness his horses that its blast and the fright and flight it caused would not unhitch his tugs, break his tongue and his harnesses, and even if he had been aware of the coming blast the evidence in this case was far from conclusive that he failed to fairly discharge the duty he would have owed. The evidence that he exercised reasonable care was the testimony of an eye-witness. The testimony that he failed to exercise such care was inference and opinion from more remote facts, and the refusal of the court to disregard the positive testimony and withdraw this question from the jury was not error.

There was no evidence in the cases that Irene Botzet was guilty of any contributory negligence, and, even if Nichols had been guilty of it, his negligence could not have been imputed to her. *Union Pac. Ry. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 152.

The city concedes that it might be liable for defects and obstructions within the limits of the roadway of the bridge which rendered that highway unsafe for travelers, but its counsel insist that it was not liable for the blowing of its whistle although it rendered the bridge unsafe, because the whistle and the blowing were beyond the limits of the bridge; and they argue that the declaration of the court below that the city was not liable in this case if the horses were frightened by the whistle of a locomotive of a railroad company sustains their position. But the city was not liable for the blast of the whistle of the locomotive, because there was no evidence that the whistling of this or other locomotives had theretofore scared horses on the bridge so as to impose upon the city the duty to suppress it, while the evidence was plenary that the blowing of the city's fire whistle had terrified horses in this way.

The general duties were imposed upon the city to exercise ordinary care to keep the roadway of this bridge reasonably safe for travel, and to so use its water works building and the whistle thereon as to inflict no unnecessary injury upon the rights or property of persons or corporations. These duties were not limited to care to prevent injuries arising from acts and omissions within the limits of the highway or bridge itself. The duty to care for the bridge and drive-

way extends to the prevention of any act outside its limits, the danger from which to travelers thereon may be reasonably anticipated by the city, such as unfenced excavation or depressions near but not in the highway or street (*City Council of Augusta v. Dozier*, 126 Ga. 524, 55 S. E. 234; *Bassett v. St. Joseph*, 53 Mo. 290; *Halpin v. City of Kansas*, 76 Mo. 335; *Parker v. City of Macon*, 39 Ga. 729), walls, billboards, and other structures on private property beyond the limits of a street (*Kiley v. City of Kansas*, 69 Mo. 102, 108, Id., 87 Mo. 103; *Duffy v. City of Dubuque*, 63 Iowa, 171, 18 N. W. 900; *Bliven v. City of Sioux City*, 85 Iowa, 346, 351, 52 N. W. 246; *Cason v. City of Ottumwa*, 102 Iowa, 99, 3 Am. Neg. Rep. 163, 71 N. W. 192), an acrobat sliding on a wire above the street fastened to a building beyond its limits and to a pole (*Wheeler v. City of Fort Dodge*, 131 Iowa, 566, 108 N. W. 1057, 1059). And the duty of the city to so use its own property as not to unnecessarily injure persons or property of others extends to their protection against injuries from such use on their own property or on the property of others, such as from sewage leaking into the property of citizens (*Allen v. City of Boston*, 159 Mass. 324, 327, 34 N. E. 519; *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.) 169; *French v. Connecticut River Lumber Co.*, 145 Mass. 261, 14 N. E. 113), from a pesthouse which sends the seeds of disease to persons on private property near (*Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667; *Haag v. Vanderburgh County Com'rs*, 60 Ind. 511), from garbage on a lot belonging to the city which sends forth upon the property of others bad odors (*City of Ft. Worth v. Crawford*, 74 Tex. 404, 12 S. W. 52, 54), from fireworks in a street which set fire to private property adjoining (*Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. 727; *Landau v. City of New York*, 180 N. Y. 48, 17 Am. Neg. Rep. 381, 72 N. E. 631).

Persons and private corporations that negligently injure persons rightfully traveling upon a street or highway by blasting rock on their own premises, thereby throwing stones upon the highway, or by negligently frightening their horses by blowing whistles upon their own property, do not escape liability for the damages they thus cause (*Albee v. Shoe Co.*, 62 Hun, 223, 16 N. Y. Supp. 687; *Knight v. Goodyear, etc., Rubber Co.*, 38 Conn. 438; *Powell v. Nevada C. & O. Ry.*, 28 Nev. 305, 17 Am. Neg. Rep. 628, 82 Pac. 96), although it is not their special duty to care for the safety of streets and highways, and *a fortiori* a city upon which the law imposes that particular duty may not escape liability for the injuries it causes in that way. Nor is the damage which may be recovered for

negligence of the character limited to that inflicted upon property. Damages for injuries to the person are likewise recoverable, because the duty imposed on the municipality to avoid unnecessary injury to persons is at least as imperative and sacred as the duty to avoid injury to their property. *Allen v. City of Boston*, 159 Mass. 324, 337, 34 N. E. 519; *Clayton v. City of Henderson*, 103 Ky. 228, 44 S. W. 667; *City of Ft. Worth v. Crawford*, 74 Tex. 414, 12 S. W. 52, 54.

The statutes of Minnesota provide that: "A public nuisance is a crime against the order and economy of the State and consists in lawfully doing an act, or omitting to perform a duty, which act or omission * * * shall unlawfully interfere with, obstruct, or tend to obstruct, or render dangerous for passage a * * * street, alley or highway." Rev. Laws, Minn. 1905, §§ 4987, 4988.

And the Supreme Court of Minnesota has adjudged that: "Where the statute, for the protection and benefit of individuals prohibits a person from doing an act or imposes upon him a duty, if he disobeys the prohibition or neglects to perform the duty, he is liable to those for whose protection the statute was enacted for any damages resulting proximately from such disobedience and neglect." *Baxter v. Coughlin*, 70 Minn. 1, 4, 72 N. W. 797, 798.

The duty was imposed upon the city to exercise care to render this highway reasonably safe for travelers, and it blew a whistle within 110 feet of it which made it unsafe for travelers, and which constituted a public nuisance within the express terms and plain meaning of this statute.

But counsel contend that the city is not liable to pay damages for the injuries inflicted by the whistle, because, in locating it and blowing it, it was exercising one of its governmental powers in the establishment and maintenance of its fire department and fire-alarm system, and this upon the ground that for the acts and omissions of its officers and agents in the exercise of a governmental power of this nature it is, like the State, exempt from civil liability. There is more than one answer to this argument. In the first place, if the blast of whistle which caused the injuries had been in the exercise of the city's power to protect against fires, it would not have been exempt from liability, because the blowing of the whistle was a public nuisance, and it was not necessary for the city to create or to continue that nuisance in order to rightly exercise its power to establish and maintain a fire department. It could have exercised that power as completely and as beneficially without locating or blowing this whistle daily within 110 feet of this bridge. If the exercise of a legislative power does not necessarily and naturally create a nuis-

ance, but that results from the manner of exercising the power, the legislative grant is no defense to an action for the damages it causes. *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197; *Hill v. Mayor*, 139 N. Y. 495, 34 N. E. 1090.

A city has two classes of powers, the one legislative, public, in the exercise of which it acts as a political subdivision and delegate of the State and governs its people, the other private, corporate, business, in the exercise of which it acts for the advantage of the inhabitants of the city and of itself as a legal personality. For the acts and omissions of its officers and agents in the exercise of powers of the former class such as the police power (*Wilcox v. City of Rochester*, 190 N. Y. 137, 82 N. E. 1119; *City of Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627, 631; *Claussen v. City of Luverne*, 103 Minn. 491, 115 N. W. 643; *Gulikson v. McDonald*, 62 Minn. 278, 279, 280, 64 N. W. 812; *City of New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426), the power to erect, maintain, and operate a city hall and courthouse (*Snider v. City of St. Paul*, 51 Minn. 466, 473, 53 N. W. 763), the power through its board of health or other agency to protect its inhabitants against disease and unsanitary conditions, and to care for the sick (*Bryant v. St. Paul*, 33 Minn. 289, 23 N. W. 220; *Maxmilian v. Mayor*, 62 N. Y. 160; *Ogg v. City of Lansing*, 35 Iowa, 495; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13, 1 N. E. 836; *Barbour v. City of Ellsworth*, 67 Me. 294), the power to maintain and operate a fire department to protect its inhabitants against conflagrations (*Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. 228; *Miller v. City of Minneapolis*, 75 Minn. 131, 5 Am. Neg. Rep. 183, 77 N. W. 788; *Smith v. City of Rochester*, 76 N. Y. 506; *Mayor v. Workman*, 67 Fed. 347, 14 C. C. A. 530; *Fisher v. City of Boston*, 104 Mass. 87), the power to promote education (*Ham v. Mayor*, 70 N. Y. 459; *Lane v. District Township of Woodbury*, 58 Iowa, 462, 12 N. W. 478), the power to inspect steam boilers (*Mead v. City of New Haven*, 40 Conn. 72), and the power to administer public charities (*Haight v. Mayor*, [D. C.] 24 Fed. 93), the city, like the State, is not liable to pay damages in civil actions.

But for damages caused by the wrongful acts and omissions of its officers and agents within the scope of their authority in the exercise of its powers of the latter class, such as its power to build and maintain bridges, streets, and highways, the power to construct and keep in repair sewers (*Murphy v. City of Indianapolis*, 158 Ind. 338, 15 Am. Neg. Rep. 144, 63 N. E. 469; *Williams v. Town of Greenville*, 130 N. C. 93, 40 S. E. 977; *Hamlin v. City of Biddeford*, 95 Me. 308, 15 Am. Neg. Rep. 146, 49 Atl. 1100; *City of Denver v. Rhodes*,

9 Colo. 554, 13 Pac. 729), the power to collect refuse and to care for the dump where it is deposited (*City of Denver v. Porter*, 126 Fed. 288, 294 61 C. C. A. 168), the power to construct and operate the draws of bridges (*Naumburg v. City of Milwaukee*, 146 Fed. 641, 77 C. C. A. 67), and the power to build, maintain, and operate water works to furnish water to the city and to its inhabitants for compensation (*Wiltse v. City of Red Wing*, 99 Minn. 255, 260, 109 N. W. 114. *Lynch v. City of Springfield*, 174 Mass. 430, 6 Am. Neg. Rep. 573, 54 N. E. 871), the city is liable to the same extent as a private individual or corporation under like circumstances. The power of a city to construct and operate water works is not a political or governmental, but a private or corporate, power, granted and exercised, not to enable it to control its people, but to authorize it to furnish to itself and to its inhabitants water for their private advantage. Ill. *Trust & Sav. Bank v. City of Arkansas City*, 22 C. C. A. 171, 182, 76 Fed. 271, 282; *Pike's Peak Power Co. v. City of Colorado Springs*, 44 C. C. A. 333, 342, 105 Fed. 1, 10; *Omaha Water Co. v. City of Omaha*, 77 C. C. A. 267, 271, 147 Fed. 1, 5.

The blast of the whistle which frightened Nichols' horses was not blown by the city in the exercise of its power to protect its inhabitants against fire and to operate its fire-alarm system or its fire department. It had no connection with or tendency to perform any of these functions. The blasts for those purposes were blown automatically through the fire-alarm system. This blast was blown by hand by the assistant engineer of the water works building by direction of the water commissioner and the city council in the exercise of the power of the city to maintain water works and care for the pumping station which was a part of them. It, therefore, falls far within the line of municipal liability.

The argument that the discretion of the city in the construction, location, and operation of its fire-alarm system is not reviewable by the courts has not escaped attention. But if sound it is not material, and hence will not be discussed because it was not the exercise of that discretion, but the blowing of the whistle by the assistant engineer of the water works building, that was the proximate cause of the injuries and death and that is the foundation of these actions. The location and use of the whistle for the fire department, dangerous as it was, would never have caused the death of Nichols and the injury to Irene Botzet if the assistant engineer of the water works building had not pulled open the valve and sent forth the blast at five in the afternoon of that fatal day.

Finally, it is said that the city is not liable because it had no cor-

porate power to cause this whistle to be blown for the purpose of notifying union men and the employees of the city of the time of day. But it had plenary power to erect, maintain, and operate the water works building. It had the power and it was its duty to so use that building and the whistle upon it that it would not inflict any unnecessary injury upon travelers upon the bridge, to prevent and, when it arose, to suppress, the public nuisance of the startling dangerous five o'clock blasts of this whistle upon it, and to exercise ordinary care to keep the bridge reasonably safe for travelers thereon. For damages caused to travelers by the failure to discharge these duties it was liable in these cases, and the evidence of such a failure was so substantial that the refusal of the court below to direct a verdict in its favor was not error.

In the Botzet Case attention is called to the facts that while the whistle was blown, and the horses were frightened and started to run in the State of Minnesota, Irene was not thrown over the railing of the bridge and was not injured until they had carried her into the State of Wisconsin; that there is a statute of the latter State which limits the amount of recovery from any city, county, town or village, on account of any defects in a bridge or highway, to \$5,000, and that the verdict and judgment in that case were far in excess of this amount, and in excess of the amount specified in the notice of the claim upon which the action is based which was originally given to the city. But this action was brought in the State of Minnesota, the city committed the wrong on which it is founded in that State, the statute of Wisconsin had no effect beyond the limits of the State of Wisconsin, and the plaintiff was not limited in his recovery to the amount claimed in his original notice. *Terrill v. City of Faribault*, 84 Minn. 341, 342, 9 Am. Neg. Rep. 35, 87 N. W. 917.

There was no error in the trial of these cases, and the judgment below must be affirmed.

It is so ordered

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY v. TAYLOR, ADM'X.

United States Supreme Court, May, 1908.

**SAFETY APPLIANCE ACT—BRAKEMAN KILLED WHILE
COUPLING CARS—STATUTE—CONSTRUCTION.**—Plaintiff's intestate, a brakeman in defendant's employ, while attempting to couple two cars, was caught between them and killed, and the

right to recover was based solely on the failure of defendant to equip the two cars which were to be coupled with such drawbars as were required by the Act of Congress known as the Safety Appliance Act (Act of Congress of March 2, 1893, 27 Stat. 531, c. 196). Recovery was had in the State court and affirmed by the highest court. On writ of error to the Supreme Court of the United States judgments of the State courts were reversed for erroneous construction of the Safety Appliance Act.

COURTS—STATE AND FEDERAL—JURISDICTION.—Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and specifically how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders, and the decision of the State court on that question is final, and does not present a Federal question. *Chambers v. B. & O. R. R. Co.*, 207 U. S. 142.

SAFETY APPLIANCE ACT—DELEGATION OF POWER—CONSTITUTIONAL LAW.—The provision in the Safety Appliance Act (Act of Congress of March 2, 1893, 27 Stat. 531, § 5) referring the designation and promulgation of the standard height and maximum varieties of drawbars for freight cars to the American Railway Association and the Interstate Commerce Commission, is not an unconstitutional delegation of legislative power to such bodies. *Buttfield v. Stranahan*, 192 U. S. 470.

SAFETY APPLIANCE ACT—DRAWBARS OF CARS—CONSTRUCTION OF STATUTE—ERRONEOUS INSTRUCTION.—The Safety Appliance Act requires that the centre of the drawbars of freight cars used on standard gauge railroads shall be, when the cars are empty, thirty-four and one-half inches above the level of the tops of the rails, and permits, when a car is partly or fully loaded, a variation in the height downward, not to exceed three inches, but the statute does not require that the variation shall be in proportion to the load nor that a fully loaded car shall exhaust the maximum permissible variation. *Therefore*, an instruction to the effect that the law required that the drawbars of a fully loaded car should be of the height of thirty-one and one-half inches, and that if either of the cars varied from this requirement the defendant had failed in the performance of its statutory duty, was erroneous.

FEDERAL QUESTION—ERROR TO STATE COURT—INSTRUCTIONS.—Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a Federal statute which will lead to a judgment in his favor, and his claim is denied by the highest court of the State, the question thus raised may be reviewed in the Supreme Court of the United States, as, in such a case, he claims a right or immunity under such statute, within the meaning of Rev. Stat., § 709.

SAFETY APPLIANCE ACT—MASTER AND SERVANT—COMMON-LAW RULE ABROGATED.—The Safety Appliance Act, (Act of Congress of March 2, 1893, 27 Stat. 531) supplants the com-

mon-law duty of reasonable care on the part of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery and appliances, and imposes upon interstate carriers an absolute duty in respect to appliances specified in the statute, and the common-law rule of reasonable care is not a defense in actions brought under such statute (1).

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which, on a second appeal, affirmed a judgment of the Crawford Circuit Court, in that State, in favor of plaintiff in an action to recover damages for death alleged to have been caused by defendant's negligence. The facts are stated in the opinion. *Judgment reversed.*

(See same case below on first appeal, 71 Ark. 445, 78 S. W. 220; on second appeal, 83 Ark. 591, 98 S. W. 958).

MESSRS. RUSH TAGGART, JOHN F. DILLON, LOVICK P. MILES, and OSCAR L. MILES, for plaintiff in error.

MR. SAM R. CHEW, for defendant in error.

1. *Safety Appliance Act.* — In *WABASH R. CO. v. UNITED STATES*, (U. S. C. C. A., *Seventh Circuit, Illinois*, June, 1909) 172 Fed. Rep. 864, the common-law rule was held to be supplanted by the statutory duty imposed upon railroad companies by the Safety Appliance Act (March 2, 1893, c. 196, § 2, 27 Stat. 531, U. S. Comp. St. 1901, p. 3174), and it was no defense, in an action for violation of the provision as to couplers on cars, that a railroad company used due diligence in respect thereto. The rule in *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616 (the case at bar) *followed*. The writ of error in the *Wabash R. Co. v. U. S.*, *supra*, was to reverse a judgment entered in favor of the United States for \$100 upon each of four counts of a declaration charging violations of section 2 of the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]). The specific act of violation charged in the first count is that the coupling and uncoupling apparatus on the "B" end of a certain

locomotive engine, and in the second, third and fourth counts respectively, that the coupling and uncoupling apparatus on the "B" end of each of three certain freight cars, all used by plaintiff in error on its line of railroad in the movement of interstate traffic, were out of repair and inoperative to an extent that necessitated men engaged in the coupling and uncoupling of these cars, going between the respective ends of the locomotive and cars in question and those to which they were attached in performance of their duty.

The opinion was rendered by GROSSCUP, Circuit Judge, and it was held that a locomotive engine used in interstate commerce need not necessarily have automatic couplers at both ends to comply with the Safety Appliance Act, where one end only is coupled and intended to be coupled to other cars. *Distinguishing* *Johnson v. So. Pac. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 17 Am. Neg. Rep. 412.

The learned judge, on the question of common law and statutory duty, said:

MR. JUSTICE MOODY delivered the opinion of the court. — The defendant in error, as administratrix of George W. Taylor, brought, in the Circuit Court of the State of Arkansas, this action at law against the plaintiff in error, a corporation owning and operating a railroad. Damages were sought for the benefit of Taylor's widow and next of kin, on account of his injury and death in the course of his employment as brakeman in the service of the railroad. It was alleged in the complaint that Taylor, while attempting, in the discharge of his duty, to couple two cars, was caught between them and killed. The right to recover for the death was based solely on the failure of the defendant to equip the two cars which were to be coupled with such drawbars as were required by the Act of Congress known as the Safety Appliance Law. 27 Stat. 531, (chapter 196, U. S. Comp. Stat. 1901, p. 3174). The defendant's answer denied that the cars were improperly equipped with drawbars, and alleged that Taylor's death was the result of his own negligence. At a trial before a jury upon the issues made by the pleadings, there was a verdict for the plaintiff, which was affirmed in a majority

"The second question is raised by the following instruction to the jury, to which exception was duly entered: 'The testimony of the defendant's witnesses was admitted here as to the inspection of those cars, for the purpose of tending to show as far as in your judgment it does tend to show, that the defendant's cars were in good order. The mere fact that the defendant had used diligence or care to keep those cars in a reasonably safe condition is not a question before you. That is no defense to this suit. This statute is commanding, and requires the defendant at its peril to keep these couplers in such condition so that the men whose business it is to couple them will not be required to go between the cars to do it; and if you believe from all the evidence in this case that they were so out of order that they could not be coupled without men going between the cars to do the coupling, then the defendant would be guilty under this declaration, and you will so find' — supported by evidence tend-

ing to show that the plaintiff in error had used diligence and care to keep the cars in a reasonably safe condition.

"Since this case was brought here and the briefs filed, this question has been disposed of against the contentions of the plaintiff in error in the case of *St. Louis, I. M. & S. R. Co. v. Taylor, Adm'x*, 210 U. S. 281, 28 Sup. Ct. 616."

Judgment reversed, on the point relating to "couplers" and affirmed on other points, and case remanded to the District Court (Eastern District of Illinois) with instructions to modify accordingly. See 172 Fed. 864.

Bibliographical note. A convenient handbook has recently been published by the INTERSTATE COMMERCE COMMISSION, entitled "AN INDEX-DIGEST OF DECISIONS UNDER THE FEDERAL SAFETY APPLIANCE ACTS" (with citations and excerpts from other cases in which the Acts have been constructed), prepared by OTIS BEALL KENT, Esq., by direction of the INTERSTATE COMMERCE COMMISSION.

opinion by the Supreme Court of the State. The judgment of that court is brought here for re-examination by writ of error. The writ sets forth many assignments of error, but of them four only were relied upon in argument here, and they alone need be stated and considered. It is not, and cannot be, disputed that the questions raised by the errors assigned were seasonably and properly made in the court below, so as to give this court jurisdiction to consider them; so no time need be spent on that. But the defendant in error insists that the questions themselves, though properly here in form, are not Federal questions; that is to say, not questions which we, by law, are authorized to consider on a writ of error to a State court. For that reason it is contended that the writ should be dismissed. That contention we will consider with each question as it is discussed.

The accident by which the plaintiff's intestate lost his life occurred in the Indian Territory, where, contrary to the doctrine of the common law, a right of action for death exists. The cause of action arose under the laws of the Territory, and was enforced in the courts of Arkansas. The plaintiff in error contends that of such a cause, triable as it was in the courts of the Territory created by Congress, the courts of Arkansas have no jurisdiction. This contention does not present a Federal question. Each State may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders. *Chambers v. Balt. & O. R. R. Co.*, 207 U. S. 142, 28 Sup. Ct. Rep. 34. We have, therefore, no authority to review the decision of the State court, so far as it holds that there was jurisdiction to hear and determine this case. On that question the decision of that court is final.

The next question represented requires an examination of the Act of Congress upon which the plaintiff below rested her right to recover. Section 5 of the Safety Appliance Law is as follows:

"Within ninety days from the passage of this Act the American Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centres of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a minimum variation from such standard to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the

Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said Association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for."

The action taken in compliance with this law by the American Railway Association, which was duly certified to and promulgated by the Interstate Commerce Commission, was contained in the following resolution:

"*Resolved*, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centres of the drawbars, for standard-gauge railroads in the United States, shall be thirty-four and a half inches, and the maximum variation from such standard heights to be allowed between the drawbars of empty and loaded cars shall be three inches.

"*Resolved*, That the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centres of the drawbars, for the narrow-gauge railroads in the United States, shall be twenty-six inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches."

It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. Rep. 349, a case which, in principle, is completely in point. And see *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. Rep. 367, where the cases were reviewed.

Before proceeding with the consideration of the third assignment of error, which arises out of the charge, it will be necessary to set forth the course of the trial and the state of the evidence when the

cause came to be submitted to the jury. This is done, not for the purpose of retrying questions of fact, which we may not do, but, first, to see whether the question raised was of a Federal nature; and, second, to see whether error was committed in the decision of it. Taylor was a brakeman on a freight train, which had stopped at a station for the purpose of leaving there two cars which were in the middle of the train. When this was done the train was left in two parts, the engine and several cars attached making one section and the caboose with several cars attached making the other. The caboose and its cars remained stationary, and the cars attached to the engine were "kicked" back to make the coupling. One of the cars to be coupled had an automatic coupler and the other an old-fashioned link and pin coupler. That part of the law which requires automatic couplers on all cars was not then in force. In attempting to make the coupling Taylor went between the cars and was killed. The cars were "kicked" with such force that the impact considerably injured those immediately in contact and derailed one of them. One of the cars to be coupled (that with the automatic coupler) was fully and the other lightly loaded. The testimony on both sides tended to show that there was some difference in the height of the drawbars of these two cars, as they rested on the tracks in their loaded condition, but there was no testimony as to the height of the drawbars if the cars were unloaded, except that, as originally made some years before, they were both of standard height. But as to the extent of the difference in the height of the drawbars, as the cars were being used at the time of the accident, there was a conflict in the testimony. One witness called by the plaintiff testified that the automatic coupler appeared to be about four inches lower than the link and pin coupler, although another, called also by the plaintiff, testified that the automatic coupler was one to three inches higher than the other. That the automatic coupler was the lower is shown by the marks left upon it by the contact, which indicated that it had been overridden by the link and pin coupler, and was testified to by a witness who made up the train at its starting point. Two witnesses called by defendant testified to actual measurements made soon after the accident, which showed that the centre of the drawbars of the automatic coupler was thirty-two and a half inches from the top of the rail, and that of the link and pin coupler thirty-three and a half inches from the top of the rail. The evidence, therefore, in its aspect most favorable to the plaintiff, tended to show that the fully-loaded car was equipped with an automatic coupler which, at the time, was four inches lower than the link and pin coupler of the

lightly-loaded car. On the other hand, the evidence in its aspect most favorable to the defendant tended to show that the automatic drawbar of the loaded car was exactly one inch lower than the link and pin drawbar. It was the duty of the jury to pass upon this conflicting evidence, and it was the duty of the presiding judge to instruct the jury clearly as to the duty imposed upon the defendant by the Act of Congress. Before passing to the consideration of the charge to the jury we will for ourselves determine the meaning of that Act. We think that it requires that the centre of the drawbars of freight cars used on standard-gauge railroads shall be, when the cars are empty, thirty-four and a half inches above the level of the tops of the rails; that it permits when a car is partly or fully loaded, a variation in the height downward, in no case to exceed three inches; that it does not require that the variation shall be in proportion to the load, nor that a fully-loaded car shall exhaust the full three inches of the maximum permissible variation and bring its drawbars down to the height of thirty-one and a half inches above the rails. If a car, when unloaded, had its drawbars thirty-four and a half inches above the rails, and, in any stage of loading, does not lower its drawbars more than three inches, it complies with the requirements of the law. If, when unloaded, its drawbars are of greater or less height than the standard prescribed by the law, or if, when wholly or partially loaded, its drawbars are lowered more than the maximum variation permitted, the car does not comply with the requirements of the law. On this aspect of the case the presiding judge gave certain instructions and refused certain instructions, both under the exception of the defendant. The jury were instructed, the italics being ours:

" 1. The Act of Congress fixes the standard height of loaded cars engaged in interstate commerce on standard-gauge railroads at thirty-one and a half inches, and unloaded cars at thirty-four and a half inches, measured perpendicularly from the level of the face of the rails to the centres of the drawbars, and this variation of three inches in height is intended to allow for the difference in height caused by loading the car to the full capacity, or by loading it partially, or by its being carried in the train when it is empty. Now, the law required that the two cars between which Taylor lost his life should be, when unloaded, of the equal and uniform height, from the level of the face of the rails to the centre of the drawbars, of thirty-four and a half inches, *and when loaded to the full capacity, should be of the uniform height of thirty-one and a half inches. Now, if the plaintiff, by a preponderance of the evidence, shows a*

violation of this duty on the part of defendant, then this is negligence; and if the proof by a preponderance also shows that this caused or contributed to the death of Taylor, then you should find for the plaintiff, unless it appears by a preponderance of the evidence that Taylor was wanting in ordinary care for his own safety, and that this want of care on Taylor's part for his own safety caused or contributed to the injury and death sued for, in which latter case you should find for the defendant.

"2. If there was the difference between the height of the centre of the drawbars in the two cars in question as indicated in the first instruction, then the question arises whether this difference caused or contributed to the injury and death of Taylor sued for. On that point, if such difference existed, and but for its existence the injury and death of Taylor would not have happened, then such difference is said in law to be an efficient proximate cause of Taylor's injury and death, although it may be true that other causes may have co-operated with this one in producing the injury and death of Taylor, and but for these other co-operating causes the injury and death of Taylor would not have ensued. But if such difference in height of the centre of the drawbars as aforesaid actually existed, yet if the injury and death of Taylor would have ensued just the same as it did without the existence of such difference in height of the centre of the drawbars, then such difference in the height of the centre of the drawbars is not in law an efficient proximate cause of the injury and death of Taylor."

The clear intendment of these instructions was that the law required that the drawbars of a fully-loaded car should be of the height of thirty-one and a half inches, and that if either of the cars varied from this requirement the defendant had failed in the performance of its duty. We find nothing in the remainder of the charge which qualifies this instruction, and we think it was erroneous. We should be reluctant to insist upon mere academic accuracy of instructions to a jury. But how vitally this error affected the defendant is demonstrated by the fact that its own evidence showed that the drawbar of the fully-loaded car was thirty-two and a half inches in height. Under these instructions the plaintiff was permitted to recover on proof of this fact alone. From such proof a verdict for the plaintiff would logically follow. The error of the charge was emphasized by the refusal to instruct the jury, as requested by the defendant, "that when one car is fully loaded and another car in the same train is only partially loaded, the law allows a variation of full three inches between the centre of the drawbars of such cars, without regard to

the amount of weight in the partially-loaded car." This request, taken in connection with the instruction that the drawbars of unloaded cars should be of the height prescribed by the Act, expressed the true rule, and should have been given. On the other hand, a request for instructions which was as follows: "The court charges you that the Act of Congress allows a variation in height of three inches between the centres of the drawbars of all cars used in interstate commerce, regardless of whether they are loaded or empty, the measurement of such height to be made perpendicularly from the top of the rail to the centre of the drawbar shank or draft line," contained an erroneous expression of the law, and was correctly refused. It is based upon the theory that the height of the drawbars of unloaded cars may vary three inches, while the Act, as we have said, requires that the height of the drawbars of unloaded cars shall be uniform.

But we have not the power to correct mere errors in the trials in State courts, although affirmed by the highest State courts. This court is not a general court of appeals, with the general right to review the decisions of State courts. We may only inquire whether there has been error committed in the decision of those Federal questions which are set forth in section 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), and it is strenuously urged that the error in this part of the case was not in the decision of any such Federal question. That position we proceed to examine.

The judicial power of the United States extends "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." Art. 3, § 2, Constitution. The case at bar, where the right of action was based solely upon an Act of Congress, assuredly was a case "arising under * * * the laws of the United States." It was settled, once for all time, in *Cohen v. Virginia*, 6 Wheat. 264, that the appellate jurisdiction, authorized by the Constitution to be exercised by this court, warrants it in reviewing the judgments of State courts so far as they pass upon a law of the United States. It was said in that case (p. 416): "They (the words of the Constitution) give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, law, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided;" and it was further said (p. 379): "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States,

whenever its correct decision depends on the construction of either." But the appellate jurisdiction of this court must be exercised "with such exceptions and under such regulations as the Congress shall make." Art. 3, § 4, Constitution. Congress has regulated and limited the appellate jurisdiction of this court over the State courts by section 709 of the Revised Statutes, and our jurisdiction in this respect extends only to the cases there enumerated, even though a wider jurisdiction might be permitted by the constitutional grant of power. *Murdock v. Memphis*, 20 Wall. 590, 620. The words of that section material here are those authorizing this court to re-examine the judgments of the State courts "where any title, right, privilege, or immunity is claimed under * * * any * * * statute of * * * the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed * * * under such * * * statute." There can be no doubt that the claim made here was specifically set up, claimed, and denied in the State courts. The question, therefore, precisely stated, is whether it was a claim of a right or immunity under a statute of the United States. Recent decisions of this court remove all doubt from the answer to this question. *McCormick v. Market Nat. Bank*, 165 U. S. 538, 17 Sup. Ct. Rep. 433; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. Rep. 831; *San Jose Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 23 Sup. Ct. Rep. 487; *Nutt v. Knut*, 200 U. S. 12, 26 Sup. Ct. Rep. 216; *Rector v. City Deposit Bank Co.*, 200 U. S. 405, 26 Sup. Ct. Rep. 289; *Ill. Cent. R. R. Co. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. Rep. 153; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 27 Sup. Ct. Rep. 391; *Hammond v. Whittredge*, 204 U. S. 538, 27 Sup. Ct. Rep. 396. The principles to be derived from the cases are these: Where a party to litigation in a State court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured so that they shall have the same meaning and effect in all the States of the Union.

It is clear that these principles govern the case at bar. The defendant, now plaintiff in error, objected to an erroneous construction of the Safety Appliance Act, which warranted on the evidence a judgment against it, and insisted upon a correct construction of the Act, which warranted on the evidence a judgment in its favor. The denials of its claims were decisions of Federal questions reviewable here.

The plaintiff in error raises another question which, for the reasons already given, we think is of a Federal nature. The evidence showed that drawbars which, as originally constructed, are of standard height, are lowered by the natural effect of proper use; that, in addition to the correction of this tendency by general repair, devices called "shims," which are metallic wedges of different thickness, are employed to raise the lowered drawbar to the legal standard; and that, in the caboose of this train, the railroad furnished a sufficient supply of these shims, which it was the duty of the conductor or brakeman to use as occasion demanded. On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbars resulted from the failure to use the shims, that was the negligence of a fellow-servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. R. Co. v. Delk*, 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to

supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from the violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measureably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. But for the reasons before given, the judgment must be reversed.

Judgment reversed.

MR. JUSTICE BREWER concurs in the judgment.

SLOSS-SHEFFIELD STEEL & IRON COMPANY V. DORMAN.

Supreme Court, Alabama, April, 1909.

WATERS AND WATER COURSES — OVERFLOW OF SURFACE WATER — ADJOINING LAND OWNER — PLEADING — STATUTE OF LIMITATIONS.—In an action to recover damages for injuries to plaintiff's land by overflow of surface water, due to alleged neglect of defendant to keep open the waterways or culverts under its railroad, through which flowed the waters of a stream that naturally drained the surface water from plaintiff's land, it was *held* that the statute of limitations commenced to run from the time of the injury and not from the time of the construction of the said waterways under defendant's railroad, and judgment for plaintiff was affirmed (1).

APPEAL from Circuit Court, Jefferson County.

ACTION by H. T. Dorman against the Sloss-Sheffield Steel & Iron Company. From a judgment for plaintiff, defendant appeals. *Judgment affirmed.*

The plea under discussion is plea No. 4, and is as follows: "Defendant, for further answer to the complaint, and to each count separately and severally, says that the defendant, at a time more than ten years before the commencement of this action and the time of the grievances complained of, constructed the said trestle, culverts, openings, and embankments along and near the plaintiff's said land in the way and manner complained of in said complaint for the passage of water which had to flow through, and for the drainage of the plaintiff's said land, and committed at said time the other grievances charged in the complaint; and defendant avers that, since the original construction of said trestle, culverts, and openings, the defendant has continued to maintain said obstructions up to the time of the commencement of this suit, with the same effect of overflowing and damaging plaintiff's land in time of high water, and to the same extent during the said period of ten years as at the time this suit was brought and the grievances complained of occurred, of which plaintiff made no complaint, but acquiesced therein; and the defendant avers that during the said period of ten years before the

1. See Notes of Cases at end of case at bar, relating to liability of land owners for injuries to property caused by overflow of surface water.

commencement of this suit the defendant claimed the right to maintain, and did maintain, the said pipes, culverts, and openings near the plaintiff's said property openly, notoriously, adversely to the plaintiff and all the world, and under claim of right to do so, and has thereby now acquired by prescription to adverse possession the right as against the plaintiff to so maintain its said trestle, culverts, and openings with effect, causing the water to overflow plaintiff's said land as alleged in the complaint was done."

TILLMAN, GRUBB, BRADLEY & MORROW and CHARLES E. RICE, for appellant.

SAM WILL JOHN and T. T. HUEY, for appellee.

DENSON, J.— This is an action by H. T. Dorman against the Sloss-Sheffield Steel & Iron Company to recover damages for injury to the plaintiff's land, consequent to the overflow thereon of surface water. Such damage is alleged to have been caused by the neglect of the defendant to keep open the waterways or culverts under its railroad, through which flowed the waters of a stream that naturally drained the surface water from plaintiff's land, in that the waters of this stream, being by such negligence checked, obstructed, and prevented from freely flowing away, were thrown back upon the plaintiff's land, so submerging it and depositing refuse matter thereon as to depreciate its value. The injuries complained of are averred to have occurred in the years 1904 and 1905, and the action was begun on July 7, 1905. The defendant suffered judgment in the court below, and therefrom to this court brings his appeal.

The only question submitted for decision by the assignment of errors is the sufficiency or not of plea 4, by which defendant sought in the trial court to set up a prescriptive right in bar of the action, acquired by adverse user of ten years. The appellant contends that, according to the ruling made in *Shahan v. Ala. Gt. So. R. Co.*, 115 Ala. 181, 22 So. Rep. 449, the plea is insufficient, and the court erred in sustaining the demurrer thereto. On the other hand, appellee contends that the judgment on the demurrer finds full support in the case of *S. A. & M. R. R. Co. v. Buford*, 106 Ala. 303, 17 So. Rep. 395. These are the only authorities cited in briefs of counsel.

We are not driven to the necessity of overruling either of the cases cited, for they are not in conflict. In the *Shahan Case* the gravamen of plaintiff's cause of action consisted in the negligent construction of the embankments and culverts complained of. Of the complaint the court said: "The gist of the complaint is the averred negligence of the defendant in failing to construct and main-

tain sufficient openings for the passage of the water which fell on that day." It was held on that occasion that ten years' adverse user, properly pleaded, would be sufficient answer to the cause of action alleged, which cause of action, as we have shown, proceeded upon the theory of negligence in the construction of the embankment and culverts, by which they were necessarily rendered injurious. In the case in judgment the complaint alleged no negligence in the construction of the waterways or culverts under defendant's railroad, but the gravamen of it is that defendant allowed its waterways and culverts to become filled up, and that their capacity for carrying off the water was decreased by defendant's permitting them to become so clogged. So far as the waterways and culverts, in themselves are concerned, they were amply sufficient, in their manner of construction and their dimensions, to carry off all the water, and were therefore not necessarily injurious, or invasive of the rights of others, and of themselves afford no cause of action.

In this state of the case, according to the ruling made in *S. A. & M. R. R. Co. v. Buford*, *supra*, whatever of legal injury may result from the failure to keep open the waterways or culverts "furnishes a cause of action accruing when the injury occurs, and then the statute of limitation commences to run, and there may be as many successive suits and recoveries as there are successive injuries." In other words, as was said in the *Buford* Case, the waterways and culverts "were lawful structures, lawfully erected, and furnished plaintiff no cause of action. Plaintiff's legal injury, which gave him a cause of action, was coincident with the overflow of his land," caused by the filling up of the waterways or culverts, "and it is from the happening of the injury the statute of limitations commenced to run." *Polly v. McCall*, 37 Ala. 20.

It follows that the plea is insufficient, and that the court properly sustained the demurrer thereto.

Affirmed.

DOWDELL, CH. J., and SIMPSON and MAYFIELD, JJ., concur.

NOTES OF CASES RELATING TO LIABILITY OF LAND OWNERS FOR INJURIES TO PROPERTY CAUSED BY OVERFLOW OF SURFACE WATER, ETC.

Waters and watercourses — Reservoir — Landlord and tenant — Injury to adjoining land by seepage — Liability of lessor.

In *CANON CITY & CRIPPLE CREEK R. R. CO. ET AL. v. OXTOBY*, (*Colorado Supreme*, May, 1908) 100 Pac. 1127, appeal from judgment for plaintiff in the District Court, Fremont county, in an action to recover damages caused

by seepage water, which escaped from an artificial excavation or pond of defendants and reached an injured plaintiff's lands, judgment was *affirmed*. The opinion was rendered by CAMPBELL, J., who, after stating the facts, discussed the points raised by defendant, as follows:

"It is the general rule that where a landlord lets his land in good condition, and by the terms of the lease is not obliged to keep the same in repair, for an injury which results to third persons from an improper use of, or from a nuisance put upon, the same and maintained by the tenant, the latter, and not the former, is liable. But where, at the time of the lease, a nuisance upon the premises has been created and still exists, or where something has therefore been put upon, or done to, the land which, from the use to be made of it, necessarily, or probably will cause injury to a stranger, the lessor, as well as the lessee, may become liable. 2 McAdam on Landlord and Tenant (3d ed.), § 374 *et seq.* The borrow pit in this case was made by the lessor in such a place that necessarily surface water from rains and melted snow would collect in it, and what did not pass off by evaporation would, in the natural course of things, have a tendency to seep through the banks and sink through the bottom of the pit, and following the slope of the country, ultimately reach plaintiff's land." * * *

"The point is made by defendants that such damage could not reasonably have been foreseen. If such a defense is good in this kind of a case, we think proof of it has not been made. The evidence shows, and it is a matter of common knowledge, that water collected in a reservoir, if the same is not artificially drained, or its banks and bottom puddled, has a tendency to seep and will seep or percolate into the adjacent lands, and if as here, the same is adobe soil, to its injury. Defendants are presumed to know of this physical law." * * *

"The important and difficult question in this case is whether, assuming that plaintiff's land was injured, and that it was the result of the acts of defendants in collecting surface waters in the borrow pit, the defendants are liable therefor. An examination of the many apparently conflicting decisions upon the law of surface waters in this country and England reveals that there are three different rules applicable thereto — what is called the civil-law, the common-law, and the modified rules. 30 Am. & Eng. Enc. of Law (2d ed.) 323 *et seq.*

"By our statute the common-law of England, so far as the same is applicable and of a general nature, is the rule of decision in this State. Unless local conditions render it inapplicable to surface waters, the common-law rule prevails with us. In our view of the facts, however, we do not think it makes any difference which rule is to be followed; for whether the relative rights of adjacent land owners as to surface waters is to be determined by the civil-law, or the common-law, or the so-called modified rule, under neither has one owner the right to collect in an artificial channel, or reservoir, or pond, surface water, and discharge it upon his neighbor's lands, to his injury, in a different manner from that in which it would naturally flow, if not interfered with, or to cast it in a greater volume, or permit it to escape, thereon in a more injurious way, either upon the surface or under surface, by the natural law of percolation.

"By section 2272, Mills' Ann. St., the owner of a reservoir which is built and used for storing water for the purpose of irrigation is made

liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of its embankments; and a similar statutory liability is imposed upon the owner of irrigating ditches. It is true that this responsibility is laid only upon the owners of reservoirs which store water for irrigation. This right of storage includes water or flood waters, as well as waters delivered from a natural watercourse. It was said in *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. 760, that the foregoing statute, imposing liability upon owners of reservoirs, is simply an affirmation of a common-law principle, thereby indicating that at common law one who collects surface waters in a pond or reservoir is liable in damages for injuries from seepage therefrom to the adjacent lands of another. In the absence of the foregoing statute, which in the view of this court in the case cited is but an affirmation of what the rule was at the common law, for injuries occasioned to the adjoining lands of another by seepage of water, there is just as much reason for imposing liability upon the owner of the pond or lake into which he has gathered surface water for no other beneficial use, but merely as an incident to a proper use of his own lands, as upon one who stores water in a reservoir for irrigation. Among the cases which we think in principle sustain our conclusion are *Mulvihill v. Thompson*, 114 Iowa, 734, 87 N. W. 693; *Hurdman v. Northeastern Ry. Co.*, 3 C. P. D. 168; *Central of Ga. Ry. Co. v. Windham*, 126 Ala. 552, 28 So. Rep. 392; *Springfield & M. Ry. Co. v. Henry*, 44 Ark. 360; *Templeton v. Voshloe*, 72 Ind. 134; *Adams v. Walker*, 34 Conn. 466; *Pettigrew v. Village of Evansville*, 25 Wis. 223; *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993; *Vernum v. Wheeler*, 35 Hun. (N. Y.) 53; *Angell on Watercourses* (6th ed.), § 108j, 108k.; *Vanderviele v. Taylor*, 65 N. Y. 341, 246." * * *

Rehearing denied April 5, 1909.

Waters and watercourses — Irrigation ditch — Changes made by railroad.

In *DENVER & RIO GRANDE R. R. Co. v. HECKMAN*, (*Colorado Supreme*, May, 1909) 101 Pac. 976, judgment for plaintiff for \$600 in the District Court, Chaffee County, in an action for damages alleged to have been sustained by him on account of changes made by defendant in an irrigation ditch owned by plaintiff, was *affirmed*. Defendant's appeal was mainly on questions of pleading and practice. Opinion by *MUSSEY, J.*

Waters and watercourses — Diversion of watercourse — Property flooded.

In *MADISONVILLE, HARTFORD & EASTERN R. R. Co. v. GATTON ET AL.*, (*Kentucky*, October, 1909) 121 S. W. Rep. 640, judgment for plaintiffs in the Circuit Court, Muhlenberg county, was *affirmed*, the case being stated by *HOBSON, J.*, as follows:

"The railroad of the Madisonville, Hartford & Eastern Railway Company was constructed through the land of W. T. Gatton and wife. After the construction of the road they brought this suit against the company, alleging that it had diverted a natural water course, thereby causing the water to run upon their land, when by nature it flowed in another direction, and had thus washed sand upon the land, made it wet, and unproductive; that it had so filled up their spring that the water could not be

used, in all to their damage in the sum of \$1,000. The petition contained these words: 'That this suit is brought not for any future damage, but for the damage which has occurred up to the filing of same.' The defendant filed an answer traversing the allegations of the petition. The case was heard before a jury, who returned a verdict in favor of the plaintiffs for \$200. Judgment was entered upon the verdict, and the defendant appeals.

"The proof heard on the trial showed clearly that the defendant had diverted the water, and had turned upon the plaintiffs' land water which by nature did not run there. It also showed that about the time this suit was brought the defendant had remedied the trouble by cutting a ditch which turned the water back to its original course. Practically the only controversy on the trial was as to the amount of damages. The proof for the plaintiffs showed that three or four acres of land were covered with sand; that the spring was filled up so that they could not get water from it; and that the sand rendered the land unfit for cultivation. The proof for the defendant was to the effect that only about one-third of an acre was covered with sand, and that this was practically the only damage done. The land was worth perhaps fifty dollars an acre, and we cannot say that the verdict is palpably against the evidence or that it is so excessive as to indicate passion or prejudice on the part of the jury." * * *

"The fact that the plaintiffs did not sue in their petition for future injury in case the wrong was continued is no reason they may not recover for the depreciation of their land already suffered."

Waters and water courses — Adjoining land owner — Surface water.

In *THOMPSON v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.*, (*Missouri Appeals, Kansas City*, May, 1909) 119 S. W. Rep. 509, appeal from judgment for plaintiff in the Circuit Court, Jackson county, in an action for damages to plaintiff's property alleged to have been caused by wrongful diversion of surface water, judgment was *reversed*. Opinion by JOHNSON, J. The points decided are stated in the syllabus to the report in 119 S. W. Rep. 509, as follows:

"A land owner may improve his property in any lawful way, and is not liable for incidental injuries caused to adjoining property in doing so, if he does not use his own property so as to wantonly or negligently injure it.

"The duties of a railroad company in improving its property, and its liability for injuries caused by diverting surface water in doing so, are measured by the same rules that apply to an individual owner.

"Surface water is a common enemy which every owner must fight as best he may, and an owner is not liable for injury caused by the diversion of surface water incidental to the improvement of his land, the rule forbidding the dominant owner from collecting and precipitating large quantities of water on adjoining land not applying unless the diversion was wanton or reckless, so that a railroad company would not be liable for injuries caused by diverting waters upon adjoining land by putting in switches in the usual way on its own land which necessarily changed the surface so as to divert the surface water; the adjoining owner being bound to protect his land from such result."

Waters and watercourses — Injury to property by sewage — Inadequate damages.

IN *MORRIS v. MISSOURI PACIFIC RAILWAY Co.*, (*Missouri Appeals, Kansas City*, March, 1909) 117 S. W. Rep. 687, appeal by defendant from an order granting a new trial after verdict for plaintiff in the Circuit Court, Pettis county, order was *affirmed*. The action was for damages alleged to have been caused by the discharge by defendant of sewage from its machine shops at Sedalia into a natural watercourse which flowed through land of plaintiff in the vicinity of the shops. Verdict for plaintiff for \$1,000. New trial granted on the ground of inadequate damages. Evidence showed value of plaintiff's land to be such as to make the damage caused by the sewage at least \$100 an acre, and the land injured was a fifty-four acre tract. *Held*, that the trial court acted within its discretion in reviewing the award of damages, and verdict was properly set aside for inadequacy of damages. Opinion by JOHN-SON, J.

Waters and watercourses — Property damaged by overflow of water — Negligent construction of embankment.

IN *MISSOURI, KANSAS & TEXAS RAILWAY Co. OF TEXAS v. CHILTON ET AL.*, (*Texas Civil Appeals*, December, 1908) 118 S. W. 779, judgment for plaintiff in the District Court, Dallas county, was *affirmed*. TALBOT, J., stated the facts as follows:

"The appellees, A. S. and A. J. Chilton, brought this suit against the Missouri, Kansas & Texas Railway Company of Texas, the appellant, to recover damages caused by overflow of their land during the year 1905; said land being situated in what is known as 'Five-Mile creek bottom,' about nine miles south of Dallas. It was alleged by plaintiffs that the natural flow of the water in Five-Mile creek was in a southeasterly direction, but, by reason of the negligent construction of appellant's railroad embankment across said stream and the valley thereof in not providing sufficient openings through same for the water to pass in high water, the flow of the waters had been changed from its natural course and caused to back up against and on the west side of said embankment, causing same to break on the thirteenth of May, 1905, precipitating the waters over the land of plaintiffs, washing same, and damaging said lands to the extent of \$3,110. The defendant pleaded the general issue, and that the damage to plaintiff, if any, was due to an unusual and unprecedented rainfall. On January 16, 1907, R. G. Phillips intervened in said suit, claiming that he held notes on the land, aggregating \$1,090 without interest, which notes were secured by vendor's and mortgage liens on the land, and that, by reason of the facts pleaded by plaintiff, intervener's security had been impaired to the extent to which land had been damaged by the overflow, and asked that judgment be rendered for such injuries against the defendants, and that the court set aside to intervener such part of the damages awarded as might seem just and right. The trial before a jury resulted in a verdict in favor of the plaintiff for the sum of \$1,250, and judgment was thereupon entered by the court in favor of the plaintiffs, and against the defendant in the said sum of \$1,250, directing that the same when collected be paid into the registry of the court, to be applied two-thirds to the indebtedness of the inter-

vener, R. G. Phillips, and the balance to plaintiffs' attorneys. From this judgment the appellant prosecutes this appeal." * * *

Rehearing denied, May, 1909.

Waters and watercourses — Overflow of surface water — Insufficient culverts — Liability of railroad company.

IN FORT WORTH & DENVER CITY RAILWAY CO. *v.* SUTER, (*Texas Civil Appeals*, February, 1909) 118 S. W. 215, judgment for plaintiff in the District Court, Wichita county, was *affirmed*, the case being stated by SPEER, J., as follows:

"This is an appeal by the Ft. Worth & Denver City Railway Company from a judgment in favor of R. H. Suter for \$1,000 as damages growing out of an overflow alleged to have resulted from a failure of the railway company to maintain proper culverts for the escape of water.

"It is first urged that the court erred in the following paragraph of his charge, to wit: 'It is the duty of a railway company in constructing and maintaining its roadbed and track to provide and maintain the necessary culverts and sluiceways to carry the waters of all streams which it may cross and the surface waters resulting from rainfall as the natural lay of the land requires, so as not to divert such waters from their natural course.' The proposition announced is that it is the duty of a railway company to use ordinary care to maintain the necessary culverts and sluices to carry off the water of streams and surface, whereas the court imposed upon appellant the absolute duty of doing so. The charge as given appears to be fairly within the statute (article 4436, Rev. St. 1895), and is abundantly supported by the authorities. *Austin & N. W. Ry. Co. v. Anderson*, 79 Tex. 427, 15 S. W. 484; *Clark v. Dyer*, 81 Tex. 339, 16 S. W. 1061; *Tex. & Pac. Ry. Co. v. Whitaker*, 36 Tex. Civ. App. 571, 82 S. W. 1051; *S. A. & A. P. Ry. Co. v. Gurley*, 37 Tex. Civ. App. 283, 83 S. W. 842. While appellee's petition alleges that appellant's failure to construct the necessary culverts and sluiceways was negligence, it nevertheless sets forth such facts as to show that appellant has not complied with the statute cited, and his rights are not thereby limited by the further unnecessary allegation that such failure was negligence. Moreover, the failure to perform a plain statutory duty resulting in injury to another is necessarily negligence." * * *

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* WALLACE ET AL.

Supreme Court, Arkansas, April, 1909.

CARRIER OF GOODS—TRANSPORTATION BEYOND CARRIER'S ROAD—CONTRACT—CONNECTING CARRIER—LIABILITY FOR INJURY TO GOODS.—By the common law and independent of any statutory provision or replevin, a common carrier is not bound to assume responsibility for the transportation of

property safely and without unnecessary delay beyond the terminus of its own road, but, independent of any statutory liability, a carrier may accept and contract to transport and deliver property beyond the terminus of its own line, so that the liability which it assumes at the beginning of the carriage continues throughout the transit to the point of delivery and renders it liable for any loss, injury, or delay on the line of the carrier over which part of the transportation is carried, and the subsidiary carrier becomes the agent of the contracting carrier, and the employees and agents of the connecting line become its servants and employees for whose negligence it is liable to the owner of the property injured by such negligence.

CARRIER OF GOODS—LIMITING LIABILITY—NEGLIGENCE.

—A common carrier cannot contract for exemption from liability growing out of its own negligence or the negligence of its servants, even though not inhibited from making such exemption by any statutory provision or regulation.

CARRIER OF GOODS—LIVE STOCK INJURED—DELAY IN TRANSPORTATION—DERAILMENT AND WRECK OF TRAIN—NEGLIGENCE.—Derailment of the train and the wreck by which the transportation of property was so delayed that it caused damage to the property, made a *prima facie* case of negligence against the carrier. *So held*, in an action for damages to cattle being transported by defendant, a common carrier of goods, caused by alleged unnecessary and negligent delay in transportation and delivery of the cattle (1).

APPEAL from Circuit Court, Green County.

CONSOLIDATED ACTIONS by W. A. Wallace and others against the St. Louis Southwestern Railway Company. From a judgment for plaintiff in each action, defendant appeals. *Judgment affirmed.*

“On April 1, 1908, the plaintiff W. A. Wallace delivered to the defendant, a common carrier of goods, a car load of cattle at Paragould, in the State of Arkansas, to be transported to and delivered at the National Stock Yards in East St. Louis, in the State of Illinois. The plaintiff alleged that the cattle were greatly damaged by reason of the unnecessary and negligent delay on the part of the defendant in the transportation and delivery of the cattle, and he instituted this suit to recover said damages. On the same day the plaintiffs I. H. Wood and A. D. Grayson delivered to defendant two car loads of hogs at Paragould, Ark., to be transported to and delivered at the National Stock Yards in East St. Louis, Ill. And the plaintiff I. H. Wood on the same day delivered to the defendant at Paragould, Ark., one car load of cattle to be transported and delivered to the

Carrier of live stock. See, at out of injuries to live stock caused end of the case at bar, notes of some by alleged negligence of the carrier. recent cases in several States arising

same place. The last-named parties instituted separate and independent suits against the defendant, alleging that the said hogs and cattle were greatly damaged by reason of the unnecessary and negligent delay on the part of the defendant in the transportation and delivery thereof, and in their respective complaints asked for the recovery of their respective damages. The defendant filed separate answers to the complaints in these three suits. In its answers the defendant admitted that it had received and accepted the shipments, and had agreed to transport the same from Paragould, Ark., to the National Stock Yards in East St. Louis, Ill. But it alleged that a portion of the route or railroad track over which the shipments were to be carried lay in the State of Illinois, and was not owned by defendant, but that such portion of the track was owned by the St. Louis, Iron Mountain & Southern Railway Company, and that it had an arrangement or contract with said last-named railway company by which it used said track and ran and operated its trains over the same. It alleged that the transportation of said shipments was delayed by reason of the derailment and wreck of a train on that portion of the track and route, and that, inasmuch as the said portion of the track or line was under the supervision of the trainmaster and servants of the St. Louis, Iron Mountain & Southern Railway Company, the negligence by which the shipments were delayed was not caused by the defendant or by its agents and servants, and it further alleged that, at the time it undertook and agreed to transport the cattle and hogs, the several plaintiffs entered into contracts, whereby it was agreed upon valuable consideration that the defendant should not be liable for any loss or damage arising from derailment of trains or collision of trains or delay in the delivery of the cattle and hogs not arising from the negligence of defendant.

"Upon the motion of the defendant, the three cases were consolidated and were tried by the court sitting as a jury. In the trial there was an agreed statement of facts by the parties, by which it was agreed that the several plaintiffs sustained damages in the sum of fifty dollars per car to the cattle and hogs by reason of the delay in the transportation of same; that the delay occurred and was occasioned by the derailment of a train or wreck on that portion of the track or line of railroad in the State of Illinois which was owned by the St. Louis, Iron Mountain & Southern Railway Company, and which was under the supervision and direction of the train-

Carrier of goods. See also the case next reported herein and the notes of cases appended thereto, for actions arising out of damages to goods, etc., caused by alleged negligence of the carrier.

master and train dispatcher of the latter railway company; that all the damages accruing to the plaintiffs resulted from that delay, that the defendant had an arrangement or contract with the latter railway company by which it operated its own trains and cars over that portion of the route, and used that portion of the line of railroad in conjunction with said latter named railway company. Each shipment was made under a contract by which the defendant agreed to transport and carry the same from Paragould, Ark., to said above point in East St. Louis, Ill.; and the contract also contained the following provision, made upon a valuable consideration: 'It is stipulated that the live stock covered by this contract is not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market, and that the parties of the first part are exempted from liability for loss or damage arising from derailment or collision, or other accidents or causes not arising from negligence of the first party.' The defendant asked the following declaration of law, which was refused: 'The court declares the law to be that where a carrier undertakes to transport and deliver live stock to a foreign market, and in the transportation of the stock it has to transport them part of the distance over a leased line of road used in conjunction with the owner of the line, and on the account of the wreck on the leased line without the fault or negligence of the carrier the delivery has been delayed ten hours, the carrier is not liable for the damages resulting from such delay.'

"The court found in favor of the plaintiffs for the respective amount of damages as agreed on, and rendered judgments accordingly; and from these judgments the defendant now prosecutes this appeal."

S. H. WEST and J. C. HAWTHORNE, for appellant.

HUDDLESTON & TAYLOR, for appellees.

FRAUENTHAL, J. (after stating the facts as above).—The liability of the defendant in this case is determined by the contract of carriage which it made with the plaintiffs, and the arrangements which it had for using and running its own trains over that portion of the route on which the delay occurred that caused the damage. By the common law, and independent of any statutory provision or regulation, a common carrier is not bound to assume responsibility for the transportation of property safely and without unnecessary delay beyond the terminus of its own road, and after the property has been turned over to a connecting carrier. But, independent of any statutory liability, a carrier may accept and contract to trans-

port and deliver property beyond the terminus of its own line, so that the liability which it assumes at the beginning of the carriage will continue throughout the transit to the point of delivery, and thereby render itself liable for any loss, injury, or delay on the line of another carrier over which a part of the transportation is carried. And, when such contact is made, the subsidiary carrier becomes the agent of the contracting carrier, and the employees and agents of such owner of the connecting line become his servants and employees for whose negligence and default he becomes liable to the owner of the property. The carrier can thus bind himself to carry to any destination; and, if it is necessary in order to make the carriage that the goods be transported over the line of another, he assumes the responsibility of the employment of all subsidiary carriers and agents, and is liable for their defaults. 1 *Hutchinson on Carriers* (3d ed.), § 226; 6 Cyc. 481; *Chicago, etc., Ry. Co. v. Woodward*, 164 Ind. 360, 72 N. E. 558, 73 N. E. 810, 17 Am. Neg. Rep. 648; *Kansas City, Ft. Scott & Memphis R. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406; *Little Rock & Hot Springs Western R. Co. v. Record*, 74 Ark. 125, 85 S. W. 421, 17 Am. Neg. Rep. 665. In this case the defendant admits in its answer that it accepted the property and agreed to transport same from Paragould, Ark., to East St. Louis, Ill., and there deliver the same. It thereby entered into a contract whereby it bound itself to carry the goods over the entire route, and it did not concern the plaintiffs as to what agencies or lines it employed to effect the carriage. In making the transportation to the destination it secured running power for its own trains over the line of another railroad company for a portion of the route. That did not absolve it from liability, although the damage occurred on the portion of the line which was owned and managed by the other railroad company. It employed the agency of such other road, and is liable for its defaults, whether it had any direct control over it or not. As is said in 1 *Hutchinson on Carriers* (3d ed.), § 240: "If the contract clearly provides for through carriage or the facts and circumstances disclose an undertaking to transport the goods to their ultimate destination, all subsidiary carriers employed in the transportation will become the agents of the contracting carrier to effect the performance of the contract, and he can no more stipulate for exemption from liability for the negligent acts or omissions of such agent than he can stipulate for exemption from liability for his own." *Murray v. Lehigh Valley Ry. Co.*, 66 Conn. 512, 34 Atl. 506; *Railway Co. v. Martin*, 59 Kan. 473, 51 Pac. 461; 2 *Hutchinson on Carriers* (3d ed.), § 915; *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690.

It is contended by defendant that by the contract it was not liable for loss or damage arising from derailment or other accident or causes not arising from its own negligence. The defendant could not contract for exemption from liability growing out of its own negligence or the negligence of its servants, even though not inhibited from making such exemption by any statutory provision or regulation. *N. Y. Cent. R. Co. v. Lockwood*, 17 Wall. 357, 10 Am. Neg. Cas. 624; 1 *Hutchinson on Carriers* (3d ed.), § 450; 6 Cyc. 387; *Taylor v. L. R., M. R. & T R. Co.*, 39 Ark. 148; *Little Rock, M. R. & T. Ry. Co. v. Talbot*, 39 Ark. 523; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236. When the defendant runs its trains over a portion of the road of another company pursuant to an agreement that its trains while on such road should be under the control and direction of the servants of the lessor company, it constituted the employees of such company its own agents and servants over such portion of the road. and became liable for their negligence by which the property carried by the defendant became damaged. In the above case of *Murray v. Lehigh Valley R. Co.*, 66 Conn. 512, 34 Atl. 506, it was held that, if one railroad company runs its trains over a portion of the road of another company pursuant to a contract providing that its trains while on such portion of the line should be under the control and direction of the servants of the lessor company, such servants became the agents of the lessee company, and it will be liable for any injury to a passenger carried by it caused on said portion of the route by the negligent act of such servants as though they were its own employees. And this applies equally to the carriage of goods.

Now, the derailment of the train and the wreck, by which the transportation of this property was so delayed that it caused the damage, made out a *prima facie* case of negligence against the defendant which has not been overcome. *Railway Co. v. Mitchell*, 57 Ark. 418, 21 S. W. 883; *St. Louis, I. M. & S. R. Co. v. Sandiage*, 85 Ark. 589, 109 S. W. 551. It follows, therefore, that the lower court was not in error in refusing the instruction asked by the defendant, and that its finding herein is sustained by the evidence and its judgment by the law. The rights of the plaintiffs in this case are determined by the common-law liability of the defendant under the contract which it entered into herein for a through transportation and carriage of the property to the point of destination; and they are not dependent upon the provisions of the Act of Congress commonly known as the "Hepburn Act," approved June 29, 1906 (chapter 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]),

amendatory of the Interstate Commerce Act approved February 4, 1887 (chapter 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and it is not necessary, therefore, in this case to pass upon the provisions of that Act.

It is urged by the defendant that the State court has not jurisdiction over this cause of action because the shipment was an interstate shipment. We do not think that there is any merit in this contention. We presume that it bases this contention on the provisions of the Act of Congress entitled "An Act to regulate commerce" approved February 4, 1887, as amended by what is commonly known as the "Hepburn Act," approved June 29, 1906. But, as before stated, the cause of action in this case is not necessarily founded upon the rights created or given by that Act. The question of the liability of the initial carrier for the negligence of the connecting carrier is not involved in this case; and it is not necessary, therefore, in this case, to pass upon the question as to whether the State courts have jurisdiction to enforce such rights.

The judgments are therefore affirmed.

NOTES OF CASES RELATING TO INJURIES TO LIVE STOCK IN TRANSPORTATION.

In connection with *ST. LOUIS SOUTHWESTERN RY. CO. v. WALLACE ET AL.*, (Ark.) 118 S. W. 412, the preceding case reported in this volume of *AM. NEG. REP.*, see the following cases:

Live stock injured — Feeding and watering stock — Contract of shipment — Notice of claim.

In *MISSOURI & NORTH ARKANSAS R. R. CO. v. PULLEN*, (*Arkansas*, April, 1909) 118 S. W. 702, judgment for plaintiff in the Circuit Court, Boone county, was affirmed. The opinion by FRAUENTHAL, J., states the case as follows:

"On February 15, 1907, the plaintiff, B. B. Pullen, delivered for carriage at Mayfield, Ky., to the Illinois Central Railroad Company household goods and a number of head of live stock, and on that day that company, in consideration of \$100, then paid to it by plaintiff, executed to him a written contract by which it agreed to carry said goods and stock from Mayfield, Ky., to Harrison, Ark. The goods and stock were shipped in one car and were transported to Memphis, Tenn., by the Illinois Central Railroad Company, and thence to Seligman, Mo., by the St. Louis & San Francisco Railroad Company, and from that point they were carried by the defendant, the Missouri & North Arkansas Railroad Company, to Harrison, Ark., the place of destination. The plaintiff in his complaint alleged that the defendant on its line of railroad unnecessarily and unreasonably delayed the carriage of said stock and negligently failed to provide facilities for watering and feeding same, from which causes the stock was greatly damaged, and for these damages he seeks a recovery.

The defendant, in its answer, alleged that the plaintiff had an agent in charge of the stock whose duty it was to feed and water the same. It further alleged that the plaintiff shipped the stock under a contract limiting the liability of the defendant in this: That in consideration of reduced rates the plaintiff agreed that as a condition precedent for any damages for delay, loss, or injury to the live stock, he would give a notice in writing of his claim in the manner as will hereinafter be more specifically set out, and on failure to comply with said condition of the agreement he should be barred from a recovery of any such claim; and defendant charged that he did not give such notice as he had contracted to do. The case was tried by the court sitting as a jury upon an agreed statement of facts, and a finding was made and judgment was given in favor of plaintiff for \$125. From this agreed statement of facts it appears that the stock was damaged in the sum of \$125 by reason of the delay in shipping which occurred on the line of defendant's railroad."

* * *

On the point as to watering and feeding the stock, the court said:

"The agreed statement shows that the car was delayed and held at Eureka Springs, Ark., by the defendant for an unreasonable time, and that plaintiff requested defendant to give him permission to unload his stock so as to attend to their wants and save them from injury on account of the delay, and the defendant would not give him that permission. The plaintiff attempted to and did all he could to give the stock the attention that was necessary and which the stock required, and the defendant failed and refused to furnish him the opportunity and facilities for the performance of that duty. The defendant thereby became liable for the injury which thus resulted to the stock, and it was agreed in the statement of facts that the stock was damaged by reason of the delay that occurred on defendant's line at that place. The mere fact that plaintiff accompanied the stock and agreed to water and feed same did not absolve defendant from all responsibility. The defendant owed to plaintiff the duty to furnish him the ways and means to water and feed the stock." * * *

On the question of notice of claim to the carrier, the court said:

"The agreed statement of facts shows that the car with its goods and live stock arrived at Harrison, Ark., on February 19, 1907, at four o'clock P. M., and that the entire shipment in the car was not unloaded until the morning of February 21, 1907, so that the entire shipment was not delivered until that time. The plaintiff began unloading the car late in the evening of February 19th, and the taking of the live stock out to his farm, a distance of one and a half miles, where they were not mingled with other stock before the hereinafter mentioned notice was given. Upon the morning of February 21st, the entire shipment was unloaded and delivered, and on the same morning, about eight o'clock A. M., the plaintiff told the agent of defendant at Harrison, Ark., of his claim of damages. The agent then told plaintiff that he had better make out his claim, and plaintiff then asked him if it was necessary to make it out in writing, and the agent then said 'he would guess so.' The plaintiff at once made out a written claim for damages, to which he called the attention of defendant's agent, to which the agent offered no objection or protest. Now, the place

where property is to be delivered by the carrier is at the usual place for making such delivery at the point of destination, unless the specific place is named in the contract of shipment. In this case there was no evidence which indicated where the usual place of delivery was at the point of destination, and no place was named in the contract. In the absence of such proof, the plaintiff had the right in the course of unloading this property and stock to take the same to some place for care and protection, which was within a reasonable distance of the car, before it can be said that there was a completed removal of same within the meaning of this provision of the contract, and under the above provision of the contract and the circumstances of this case we do not think that a removal of the stock to the farm of plaintiff, one and a half miles from the car, was an unreasonable distance. 6 Cyc. 467.

"The plaintiff was entitled to a reasonable time in which to remove his property and stock, and we cannot say that the time required by plaintiff for such removal in this case was unreasonable. 2 Hutchinson on Carriers (3d ed.), § 712. The shipment was made in one car, and the carriage of same was indivisible. The carriage was not completed until there was a delivery at the destination. So that the delivery of the shipment was indivisible, and the delivery of no part of the shipment was completed until the delivery of the entire shipment was made, provided same was removed within a reasonable time. 6 Cyc. 465. Under the agreed statement of facts therefore we find that within one day after the removal and delivery of the stock and shipment the plaintiff gave notice in writing of his claim for damages to the agent of defendant at destination and before the stock was mingled with other stock. This was a sufficient compliance with the terms of the contract of shipment relative to the giving of notice of claim of damages." * * *

Car load of sheep injured — Common-law liability.

In *CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. HOLLOWELL*, (*Indiana Supreme*, June, 1909) 88 N. E. 680, judgment for plaintiff in the Circuit Court, Hendricks county, in action for damages for an alleged breach of defendant's common-law duty to safely carry and deliver a car load of sheep, was *affirmed*. The court (per MONKS, J.,) said:

"The law charges the common carrier with the duty of carrying all goods of the kind he professes to carry under the common-law liability, which makes him a practical insurer of the safety thereof while in his custody. The owner may rightfully demand that such property shall be received and carried under the carrier's common-law liability, and a contract limiting such liability, to which he is obliged to assent in order to secure transportation, cannot be considered as having been freely and fairly entered into, and will be of no effect in relieving the carrier from his common-law liability. It is not necessary to conclude the owner by the terms of a special contract limiting the liability of the carrier that he should actually have been offered the option of shipping subject to the terms of such contract or under the carrier's common-law liability. It will be sufficient if it would have been given if the owner had demanded it; but if such demand would have been unavailing, the owner would be under no duty to make it, and his assent to a contract restricting the

common-law liability of the carrier would not bind him by its terms. 1 Hutchinson on Carriers (3d ed.), § 404; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 407, 69 N. E. 138, 17 Am. Neg. Rep. 647; *Louisville, etc., R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018; *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803; *Chicago & N. W. Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep., note, pages 77-79, 93-95).

"It appears from the special finding: That the said car load of sheep was shipped from Danville, Ind., on June 3, 1906; that at the time a contract was prepared by appellant's agent on one of the forms furnished by it, which limited its liability in the shipment of live stock; that the same was signed on behalf of appellee and by the agent of appellant; that said form of contract was the only form of contract then in use at said station for the shipment of live stock; that no agent of appellant had any authority to make on appellant's behalf any contract for the shipment of said sheep at the risk of appellant on the payment of a higher rate than that named in said contract or on any other consideration, or to make any contract therefor except the one signed by the parties, and no opportunity was given appellee to make any contract for the shipment of said sheep, except the one executed. It is evident from said finding that any demand of appellee that appellant carry said sheep under the common-law liability would have been unavailing, because there was no one authorized to make such a contract on behalf of appellant, and therefore, under the authorities above cited, his assent to the contract limiting the common-law liability of appellant did not bind him. In such case, under the authorities above cited, appellee had the right to disregard the contract limiting the liability of appellant, because he was not bound thereby and had the right to sue for the breach of the common-law duty. *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 407, 69 N. E. 138, 17 Am. Neg. Rep. 647. This was the rule before the taking effect of said Act of 1905 (Acts 1905, p. 58, c. 47, being sections 3918-3920), *Burns' Ann. St.* 1908). Even if said Act of 1905 (sections 3918-3920), *supra*, is unconstitutional, as claimed by appellant, the conclusion of law stated in favor of appellee upon the facts found was not erroneous. It is settled law that this court will not pass upon the constitutional validity of a statute when it can properly rest its decision upon other grounds. *White v. Sun Pub. Co.*, 164 Ind. 426, 430, 73 N. E. 890, and cases cited.

"As the special finding shows that appellee was not bound by the contract limiting the common-law liability of appellant, it was liable for a breach of its common-law duty. The court did not err therefore in its conclusion of law. Judgment affirmed."

Loss of live stock — Feeding and watering — Federal statute — When carrier liable.

In *LOUISVILLE & NASHVILLE R. R. Co. v. STILES, GADDIE & STILES*, (*Kentucky*, May, 1909) 119 S. W. 786, judgment for plaintiffs for \$2,180 in an action in the Circuit Court, Nelson county, for loss of live stock shipped by defendant's road, was *affirmed*. The opinion by BARKER, J., states the case as follows:

"This is the second appeal of this case. The opinion on the first is to

be found in 110 S. W. 820. The first appeal was taken by the plaintiffs to review the judgment of the trial court in sustaining a general demurrer to their petition and dismissing it upon their declining to amend. In the opinion on that appeal we held that a common carrier was liable for the safety of live stock committed to its care for transportation, unless lost or destroyed by the act of God or the public enemy, or where the loss or destruction was the result of the inherent propensity or vice of the animals. Upon the return of the case for further procedure in conformity to the opinion, the defendant (appellant) answered, denying the value of the horses destroyed by fire as alleged in the petition, and pleading affirmatively that the horses destroyed were being transported by it as interstate commerce from East St Louis, Ill., to New Haven, Ky.; that, when the animals arrived at Louisville, Ky., under the provisions of the Federal statute requiring animals shipped by common carriers to be unloaded, fed, and watered at stated intervals, the horses were unloaded and placed in the Bourbon stockyards, to be fed, watered, and rested, and while in the stockyards they were burned by a conflagration which totally destroyed the stockyards; that this conflagration was without any negligence on the part of the carrier; and that, therefore, it was not liable for the loss occurring in the manner stated. A general demurrer to the second paragraph of the answer was sustained, and a trial upon the issue raised by the first paragraph, which is merely a denial of the value of the animals destroyed, resulted in a verdict in favor of the plaintiffs (appellees) for the sum of \$2,180. From the judgment based upon this verdict the carrier prosecutes this appeal." * * *

The court held that the Federal statute relating to duty of carriers to feed and water live stock being transported on their cars in no wise changed the common-law duty of the carrier therein except to make definite and certain how and when such stock shall be fed, etc. At common-law it was the duty of carriers of live stock for long distances to feed, water, and rest as a reasonable necessity required. Defendant was liable for the loss although the animals were unloaded at the stockyards at Louisville for the purpose of feeding, etc., in pursuance of the Federal statute regulating shipment of live stock as interstate commerce, and the stockyards were destroyed by a fire through no negligence of the carrier.

As to when liability of the carrier commences, the court said:

"The rule is that when live stock is delivered to a railroad corporation for transportation, its liability commences when the stock is delivered to it at its stock pens or warehouses for shipment, and continues until the journey is ended, the consignee notified, and a reasonable time given him to receive it. After that time, if the consignee fails to receive and care for the stock, then the carrier may place it in pens or warehouses, and the complexion of its liability is changed from that of carrier to that of warehouseman; its liability for loss as warehouseman depending upon its due care or negligence." * * *

Injury to a jack — Burden of proof.

In *KELLY v. ADAMS EXPRESS COMPANY*, (*Kentucky*, June, 1909) 119 S. W. 747, appeal from judgment for defendant in the Circuit Court, Warren county,

judgment was *affirmed*, the case being stated in the opinion by O'REAR, J., as follows:

"This action is based upon a contract of affreightment, by which appellee undertook, in consideration of \$31.68 to carry a jack for appellant from Bowling Green, Ky., to Sandusky, Mich. The jack was boxed in a crate and placed on the trucks at the depot at Bowling Green, apparently in good condition. A train which came into the station ahead of the one on which the jack was to be carried excited him so that in plunging he partially fell down in the crate and was not able to regain his position. He was loaded on the express car in a few minutes and started on his journey. Appellant was a passenger on the same train. At Lebanon Junction he went forward into the express car to see how the jack was faring, when he found him down in his box and unable to rise. The agent of the express company who was in charge of this car recommended that the jack be removed from the box. Appellant, who was without experience in shipping such live stock, said the matter was in the hands of the express agent. The latter decided to, and did, with appellant's help, take the jack out of the crate and laid him upon the floor of the express car. Still he was unable to get up. Appellant claims that the trunks and loose boxes near the jack's head, being jostled about by the swaying of the car, hit him on the head and mouth, causing them to bleed. The jack remained on the floor of the car until it reached Cincinnati, going by way of Louisville. At frequent intervals appellant went into the car to see the jack, but was unable to do anything for him. Appellant took another train at Cincinnati and did not see the jack again. At Cincinnati appellee's agents, being unable to get the jack upon his feet, called a veterinary surgeon and placed the animal in his charge, where, after lingering some days, it died. This suit was brought by appellant against appellee, charging it with a breach of the contract to carry the jack, in that it negligently allowed him to get hurt while in appellee's sole custody, from which he died, entailing a loss of \$600 on appellant. The answer denied the negligence, and denied that the jack was injured while in its charge, or died because of such injuries. It pleaded affirmatively that the jack, by reason of its own vicious propensities, injured itself, and that it died from a disease which it had before delivered to appellee for transportation. An issue being joined, the case went to the jury, who returned a verdict for appellee." * * *

After discussing the questions of negligence involved in the case the court said:

"The principal error assigned by appellant for a reversal is that the court ruled against him and to his prejudice in placing upon him the burden of proof in the case; that the instructions should not have imposed upon him the burden of showing that the jack was lost, not by reason of some disease or vicious propensity of its own. It is contended that the carrier is an insurer against its own negligence as to live stock, as it is to inert freight; but that the qualification noted in reported cases, to the effect that the injuries received by live stock because of its own vicious nature, or disposition, or from diseases not caused by the carrier's negligence, is a matter of special defense. Let it be granted; still appellant cannot avail himself of his contention in this case, because he

voluntarily assumed the onus throughout the case, and made no objection on that ground at any stage of the trial. He is now bound by his conduct.

"Appellant also claims that inasmuch as he paid the freight, \$31.68, for carrying the jack through from Bowling Green to Sandusky, and as the appellee executed only part of the contract, he was entitled to recover the amount paid as freight. While there may be circumstances under which the carrier may be absolved from performing the contract, having only partially done so, which entitles the shipper to have refunded the sum represented by the tariff for the part of the shipment not executed, there is no evidence in this case, and none offered, as to what proportion of the charges had been earned by the carrier. Assuming it was one-half, the amount remaining is too small to justify a reversal of the judgment on that account alone, and to order a new trial of the case."

Cattle injured — Contract of carriage — Notice.

In *SHUMAKER v. NORTHERN PACIFIC RY. CO.*, (*Minnesota*, May, 1909) 121 N. W. 122, appeal from order denying defendant new trial, it appeared (per opinion by LEWIS, J.) that: "In September, 1906, respondent shipped eight car loads of cattle from Big Timber, Montana, to South St. Paul, over appellant's road, under a contract which provided, as a condition precedent to his right to recover for any damages to the stock, that he would give notice in writing of his claim to some officer or station agent of the company before the stock was removed from the place of designation or was mingled with other stock, and provided, further, that no action to recover any damage for injuries to the stock should be sustained unless the action should be commenced within sixty days after the damage occurred. Three other parties shipped other car loads of stock at the same time from other points in Montana, and all of the car loads constituted a part of the same train through to South St. Paul. One of the shippers, Fraser Bros., of Billings, Mont., filed a notice within the time provided by the contract, claiming damages to the extent of \$1,100 for negligent treatment of the stock. This claim was sent for collection to George C. Stiles, an attorney at law in Minneapolis, Minn., and on or about May 7, 1907, Mr. Stiles called on Mr. Horrigan, the claim agent appellant at St. Paul, with reference to its collection. At that time no claims for damages had been filed by any of the other shippers; but it is contended by respondent that Mr. Horrigan, on behalf of the company, waived the provisions of the contract regarding time, and agreed to settle respondent's claim upon the same basis as the claim of Fraser Bros., then under consideration. Appellant having denied that it ever entered into any such agreement, this action was brought to recover the damages suffered by respondent, and the only question before this court is whether, under all of the evidence, the trial court was warranted in finding for respondent upon the question of waiver." * * *

"Without desiring to reflect upon the credibility of the witnesses or upon the judgment of the trial court, we are of opinion that respondent's contention is not fairly sustained by the evidence. The action is based upon the admission by respondent of his failure to comply with the contract and express waiver thereof by appellant. The question in dispute

does not rest alone upon the credibility of the principal witnesses. The documentary evidence is entitled to great weight, and the absence of certain correspondence is not accounted for in a very satisfactory manner. There is no reasonable explanation of the fact that the client in person presented and pressed his claim to Mr. Horrigan in July for the first time, making no mention of the fact, if it was a fact, that the matter was in the hands of his attorney. In addition to this, it may be said that it was quite apparent that Mr. Horrigan settled the West claim with the understanding that it and the Campbell claims were the two referred to in the first conversation."

Order reversed, and new trial granted.

Horse lost in transportation — Presumption of negligence — Carrier liable.

In *FOUST v. LEE ET AL.*, (*Missouri Appeals, St. Louis*, May, 1909) 119 S. W. 505, appeal from judgment for plaintiff in the Circuit Court, Pemiscot county, in an action on the common-law liability of defendants, common carriers, for the value of a horse alleged to have been lost during transportation, judgment was *affirmed*. From the opinion rendered by NORTON, J., it appeared that:

"Defendants are partners owning and operating a line of steamboats known as the 'Lee Line' which ply the Mississippi river between the city of St. Louis, Mo., and Memphis, Tenn., and prosecute the calling of common carriers for hire. Plaintiff shipped two horses on defendants' boat Reese Lee from the city of St. Louis, to Gayoso, in Pemiscot county, Mo. One of the horses was delivered at destination in good condition, and the other was removed from the boat with the thigh bone of a hind leg broken and in a dying condition. The horse was without value after its injury, and died therefrom within a day or two after landing. The evidence on the part of plaintiff tended to prove that the horse was injured in some manner on the boat prior to reaching Gayoso. No witnesses for them gave testimony, however, as to how it was injured. On the part of defendants the master of the boat testified that the horse reached Gayoso in good order; that after the freight had been removed from the boat, and while several colored men were in the act of leading the horses from the boat to the landing, one of the plaintiffs' horses became excited, backed up, and kicked the horse on the rear on the leg which resulted in breaking the leg mentioned and the consequent loss of the horse. The defense relied upon in the trial court and presented here for consideration arises from this testimony, and is to the effect that the plaintiff's horse having received its injury from the vicious propensities of its companion, also owned by the plaintiff, the finding and judgment should be for the defendants." * * *

The court, after discussing questions of practice, said:

"Where the liability sought to be enforced is that at common law, a *prima facie* case of negligence of breach of duty in respect of the transportation of animals will arise from showing that the animal was wounded as by external violence during transit, and thus evince a physical condition which does not usually attend a carriage with due care and attention. From this showing a jury is authorized to infer and may find negligence. Authorities supporting the proposition are abundant." * * *

Delay in carriage of cattle — Depreciation in value — Question for jury.

In *LIBBY ET AL. v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.*, (*Missouri Appeals, St. Louis*, March, 1909) 117 S. W. 659, judgment for defendant in the Circuit Court, Wayne county, was *reversed*. The court (per NORTON, J.) said:

"The petition is in two counts. The first count alleges, substantially: That plaintiffs delivered to the defendant thirty head of steers at Williamsville, Mo., in good condition, for the purpose of transportation over the defendant's railroad to the National Stock Yards at East St. Louis, Ill.; that the defendant accepted the consignment for the purpose of transportation in due time and with proper care; that being unmindful of its obligation in that behalf, defendant negligently delayed the transportation so as to consume thirty-one hours therefor, when eight or ten hours was a reasonable time; that by reason of the defendant's negligent and unreasonable delay, the cattle were not placed upon the market on the day they should have been, and were greatly depreciated in weight and appearance by the long delay without food or water. It is averred the market, on the character of cattle involved, was considerably lower on the day on which the defendant delivered the cattle than the day prior, on which they should have been delivered in due course. In the second count of the petition, it is stated, substantially: That plaintiffs delivered the thirty head of cattle referred to in good condition to the defendant at Williamsville, for transportation to the National Stock Yards at East St. Louis, Ill.; that the defendant accepted the consignment, and thereby assumed the obligation to safely transport and deliver the cattle in good condition at the place of destination; that wholly disregarding its duty in that behalf, and in violation of the law, defendant so carelessly and recklessly transported the cattle as to maim, skin, bruise, wound, and injure all of them, and especially cripple and injure one of said steers so as to materially depreciate the value of all. The answer was a general denial."

* * *

After reviewing the evidence the court held that a *prima facie* case was made for plaintiffs.

Among the points decided are the following:

"Under the law it was the duty of the defendant to transport the stock within a reasonable time, and where it appears unreasonable delays occurred without just cause therefor, as in this case, the question of defendant's negligence in respect of its obligation to transport the stock within a reasonable time should be referred to the jury. *Sloop v. Wabash R. R. Co.*, 93 Mo. App. 605, 67 S. W. 956; *Leonard v. C. & A. Ry Co.*, 54 Mo. App. 293, 5 Am. & Eng. Enc. Law (2d ed.) 450." * * *

"If the plaintiffs suffered a loss by reason of the decline in the market and shrinkage of their cattle, and this loss was induced because of the defendant's negligent delay in the transportation, it is a loss for which the defendant should make compensation." * * *

"It is a general rule that carriers of live stock are liable, like other common carriers, as insurers for loss or injury to the stock intrusted to them for transportation, with the exception that they are not liable for injuries occurring through the 'proper vice' of the animal being carried, and not through any negligence on the part of the carrier. 5 Am.

& Eng. Enc. Law (2d ed.) 443; *Cash v. Wabash R. Co.*, 81 Mo. App. 109; *Hance v. Pacific Express Co.*, 48 Mo. App. 179." * * *

"Defendant's obligation of insurer imposed upon it the duty to deliver the animal in good condition at destination, excepting for the intervention of an act of God, the public enemy, the proper vice of the animal, or the act or fault of the owner. 5 Am. & Eng. Enc. Law (2d ed.) 233, 234, 235. 243. This being true, it is immaterial whether the animal was injured by a human agency or otherwise, for if it were not injured as a result of the act of God, the public enemy, its proper vice, or the fault of the owner, the carrier is liable. Those risks, and those only, are taken by the shipper." * * *

"The shipper is always at liberty to exercise his option and sue either *ex delicto* upon the obligation of the carrier raised by law, or declare upon the special contract between the parties, as he may choose. The mere fact that he has taken a stipulation assuring the obligation which the law imposes does not compel the shipper to pursue the contract. He may pursue either remedy." * * *

"A common carrier may not contract against its negligence." * * *
Rehearing denied, April 6, 1909.

Delay in transporting hogs — Derailment of train — Question for jury — Carrier liable.

IN *THOMPSON v. QUINCY, OMAHA & KANSAS CITY R. R. Co.*, (*Missouri Appeals*, *Kansas City*, March, 1909) 117 S. W. 1193, action for damages to a shipment of cattle caused by delay in transportation, derailment of the train having occurred, judgment for plaintiff in the Circuit Court, Clinton county, was *affirmed*. Opinion by BROADBUSH, P. J., in the course of which he said:

"The defendant contends that under the evidence the plaintiff was not entitled to recover, and that, therefore, the court committed error in not sustaining its demurrer to plaintiff's evidence. It is conceded that it was the duty of defendant as a common carrier to have safely delivered plaintiff's hogs at their destination within a reasonable time, and that the only causes that would justify a breach of duty in that respect are those which could not be reasonably anticipated, such as the act of God, that of the public enemy, unavoidable accident, etc.

"Results, attributed to a defective roadbed or tracks and defective equipments, afford no excuse for the nonperformance of the carrier's duty to safely deliver the goods of the shipper to their destination within a reasonable time. *McFall v. Railway Co.*, 117 Mo. App. 477, 94 S. W. 570; *Vencill v. Railroad Co.*, 132 Mo. App. 722, 112 S. W. 1031.

"When it was shown that the delay was caused by a wreck of the train which it was intended should carry plaintiff's hogs, *prima facie* a case of negligence was made out, which shifted the burden of proof upon defendant to show that it was the result of unavoidable accident. *McFall v. Railway Co.*, *supra*; *Vincill v. Railway Co.*, *supra*; *Keyes-Marshall Bros. Livery Co. v. Railroad Co.*, 105 Mo. App. 556, 80 S. W. 53. This defendant undertook to do by evidence as to the good condition of its tracks and cars. But it was still a question for the jury, and not for the court to say whether defendant had made good its defense in that respect, and that question was properly submitted to the jury."

Cattle dying while in transit — Excessive heat — Absence of evidence of negligence.

In *CLEVE v. CHICAGO, BURLINGTON & QUINCY R. R. Co.*, (*Nebraska*, April, 1909) 120 N. W. 959, judgment for plaintiff in the District Court, Otoe county, was reversed, the opinion by EPPERSON, C., stating the case as follows:

"This is the second appearance of this case in this court. The former opinion is reported in 77 Neb. 166, 108 N. W. 982, 20 Am. Neg. Rep. 616. It was there held that the evidence taken on the first trial was insufficient to support the verdict in favor of plaintiff, and the case was remanded, and another trial had. The action is to recover the value of two fat steers which died in transit between Nebraska City and Chicago. The shipment was made by plaintiff under a contract with the Chicago, Burlington & Quincy Railroad Company, and the defendant is sued as the railroad company's lessee. The only question which we need to consider is the sufficiency of the evidence of negligence at the last trial to support the judgment which plaintiff obtained. The evidence given at the last trial is not materially different from that adduced at the first trial, which is referred to at some length in the former opinion. It appears, however, that complaint was made by the plaintiff to the defendant's employees, while the train stopped at Hamburg, that the cattle were in danger on account of the excessive heat, and demand was made that the train move on. The evidence shows that soon after the complaint was made, both at Hamburg and at Stanton, the train containing the stock was moved.

"In the last trial, as at the first, it was not shown by competent evidence that the delays were unnecessary, nor that all the time consumed was not required for the ordinary business of the railway company. There is really very little dispute as to the facts. The evidence shows conclusively that the plaintiff's employees were in charge of the cattle in transit; that the day of shipment was very hot, and very little air was circulating; and that the steers died as a result of the excessive heat to which they were subjected while the train was stopped at Hamburg and at Stanton. There is some evidence in the record tending to show that the railroad company's employees promised the plaintiff a fast run from Stanton and that the same was not made. This is entirely immaterial, because it is conclusively shown that all the damage complained of was done before the train left Stanton. There was also evidence in both trials that the train, at the stations above mentioned, was left standing from thirty to forty minutes between rows of box cars, thereby shutting off the circulation of air from the cattle. There was but little air circulating that day, and it is not shown that the cattle would have been any better off in any place where the company could have placed them. No demand was made by the plaintiff, or his employees, of the defendant, that the train be placed in any different or better position during the delays at these stations. There is absolutely no reason why we should recede from the former opinion.

"We recommend that the judgment be reversed, and this cause remanded for further proceedings."

The syllabus by the court in the *CLEVE* case, is as follows:

"A railroad company, shipping stock accompanied by the owner, is not liable for loss occasioned by excessive heat in transit, in the absence of competent evidence of negligence."

Live stock injured in transit—Feeding and watering—Contract—Notice.

In *ST. LOUIS & SAN FRANCISCO R. R. CO. v. COPELAND*, (*Oklahoma*, May, 1909) 102 Pac. 104, an action for damages to live stock while being carried over defendant's road, judgment for plaintiff for \$645 in the District Court, Washita county, was *affirmed*. The opinion was rendered by KANE, CH. J. The points decided are stated in the syllabus by the court as follows:

"1. The carriage of live stock involves different requirements than those involved in the carriage of inanimate objects. In view of this, it is well settled that the owner and the carrier may, by contract, provide that the carrier shall be exempt from all liability for injuries occurring to the stock disconnected and apart from the conduct and running of the trains, such as injury from loading and unloading, from overloading, suffocation, heating, and the like, or from the weakness, escape, or viciousness of the shock.

"2. Such a contract, however, does not relieve the carrier from the due performance of its undertaking. It must use at least ordinary care and diligence in the performance of all its duties, and while its obligations may be limited by special contract yet it cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence of itself or its servants.

"3. Negligence and contributory negligence are usually questions for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

"4. Where from the facts shown by the evidence, although undisputed, reasonable men might draw different conclusions respecting the question of negligence or contributory negligence, such questions are properly for the jury.

"5. Where a contract for the carriage of live stock provides that the carrier shall stop its train at any of its stations for water and feed where it has facilities for so doing, whenever requested in writing by the owner of said live stock or the attendant in charge thereof, the refusal of the agents of the carrier to unload such live stock on the oral request of the owner, basing such refusal upon the ground that the freight thereon had not been paid, waived a strict compliance with the clause of the contract requiring the request to be made in writing.

"6. The printed rules and regulations indorsed on the back of a contract for the transportation of live stock, under the head of 'Special Notice of Agents,' is no part of the contract, and is not binding upon the shipper, in the absence of some evidence of his assent to the terms of such notice.

"7. A provision in a contract for the carriage of live stock which provides 'that, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written

notification to be served within one day after the delivery of such stock at destination," does not apply when at the time said live stock was unloaded and removed by the owner he did not know of the injury done said live stock, if said injuries were such as could not be ascertained within the time limited by the contract by the exercise of ordinary care."

Horse injured — Defective car — Contract — Notice — Common-law liability.

IN *FAULK v. COLUMBIA, NEWBERRY & LAURENS R. R. CO.*, (*South Carolina*, April, 1909) 64 S. E. Rep. 383, judgment for plaintiff in the Common Pleas Circuit Court of Richland county was *affirmed*, the case being stated in the opinion by JONES, J., as follows:

"On November 6, 1905, plaintiff shipped a car load of horses over defendant's line from Columbia, S. C., to Newberry, S. C. When unloaded at Newberry, one horse was found injured, his leg having fallen through a defective floor of the car furnished by the defendant. from which injury the horse died. Plaintiff brought this action to recover damages for the loss of the horse at a valuation of \$165 and the reasonable expense incurred in trying to cure it, and recovered judgment for \$200.

"The vital question was whether the shipment was subject to a classification under which the value of the car load of horses was limited at seventy-five dollars per head. No bill of lading was issued or signed. The plaintiff phoned for the car, and ascertained that the rate would be nineteen dollars for the car load. The car was placed for plaintiff, and was loaded by him Sunday night, and was unloaded by him at Newberry early Monday morning. During the conversation over the phone nothing was said about classification or valuation other than the rate should be nineteen dollars per car load, and plaintiff testified that he knew nothing of the classification as established by the Railroad Commission. The only paper in writing was the waybill covering a shipment of a car load of horses, 'weight 20,000 class N, rate \$10.00,' which waybill plaintiff had never seen until the day before the trial. There was not even an oral agreement as to classification and valuation." * * *

"In the absence of a bill of lading or contract of shipment agreeing upon a valuation, the defendant was liable as at common-law for the true value of the property.

"Where a shipper of goods by special contract agrees upon a value to be placed upon such goods in case of loss and in consideration thereof obtains a reduced rate of transportation, he is bound by the stipulation, and is estopped from showing that the real value of the goods was greater than that specified in the contract. *Johnstone v. Railroad Co.*, 39 S. C. 60, 17 S. E. 512." * * *

"The general rule is 'that a carrier cannot limit its liability by any mere notice unless such notice is shown to have been brought to the knowledge or attention of the shipper within a reasonable time before shipment and to have been expressly assented to by him.' 5 Ency. Law, 290, and cases cited to show the necessity of express assent on the part of the shipper." * * *

"The contention by appellant being an attempt to limit common-law

liability by a public notice, it must fail under the express terms of section 1709, Civ. Code 1902, which provides: 'No public notice or declaration shall limit or in any wise affect the liability at common law of any public common carriers for or in respect of any goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of or injury to any articles and goods delivered to them for transportation, any public notice or declaration by them made and given contrary thereto or in any wise limiting such liability notwithstanding.'

* * *

Cows placed in infected pens — "Texas fever" — Carrier liable.

In *INTERNATIONAL & GREAT NORTHERN R. R. Co. v. McCULLOUGH*, (*Texas Civil Appeals*, March, 1909) 118 S. W. 558, appeal by defendant from judgment for plaintiff in the Bexar County Court, judgment was *affirmed*, the case being stated by FLY, J., as follows:

"Appellee alleged in his petition: That on July 26, 1905, he shipped from Batavia, Ill., to the city of Mexico, thirty-eight head of Holstein milk cows; that en route the cattle were delivered to appellant, by its connecting carriers, at Taylor, Tex., on July 31st, and were transported to Laredo, Tex., by appellant, which point they reached on August 1st too late to be crossed into Mexico, until next morning, and on account of the great heat and the length of time the cattle had been on the train it became necessary to unload them and place them in pens provided by appellant; that the pens were infested with insects, which gave the cattle a fever known as 'Texas' or 'splenetic' fever, from which four of the cows died, and great expense was incurred in connection with the disease of the other cattle, to appellee's damage in the sum of \$600. Appellant answered by general and special exceptions, and that appellant was forced to unload the cattle at Laredo by the agent of appellee in charge of them, and that they were unloaded contrary to the laws and rules of the Department of Agriculture of the United States. The court sustained a demurrer to the latter portion of the answer, and, on the cause being tried by jury, a verdict and judgment for appellee were rendered in the sum of \$350.

"The plea of contributory negligence as to the unloading of the cattle was properly stricken out. If such an improbable proposition could be entertained of one man forcing a railroad company to unload cattle, still it was no defense to the action to allege that the cattle were unloaded in defiance of a regulation of a governmental department. The cattle were not injured by being unloaded, but by being put in infected pens. In view of the testimony, had the plea been a proper one, it would not form a ground of reversal, because it appeared that the unloading of the cattle was not forced, as alleged, by the agent of appellee, but were only unloaded after appellant's agent had given the assurance that there was not 'a particle of danger in putting the cattle there.' The agent of appellee was not a cattleman, and knew nothing of the danger of infection, and acted on the advice of an employee of appellant. Appellant was the active agent in unloading the cattle, and cannot screen itself from responding in damages because it may have been a violation of law to unload the cattle. It was not the unloading, but the confinement in infected

pens, that the evidence showed was the proximate cause of the damages sustained by appellee. The employee of appellant did not swear that any force was used to have the cattle unloaded, but merely that a request was made that they be unloaded. He did not warn the agent of appellee of the danger of placing the cattle in the pens. It was the duty of appellants to furnish reasonably safe pens for the cattle after they had been unloaded, especially as the delay was caused by its failure to connect with the Mexico train. The evidence showed that the fever that seized the cattle and caused the damage was occasioned by the use of the pens that had previously been used by Texas cattle. The regulations of the Department of Agriculture, as to where cattle could be unloaded in Texas, have reference only to cattle being shipped from one State to another, and are for the protection of other cattle at the point of destination, and not for the safety of the cattle being shipped." * * *

Rehearing denied, April 14, 1909.

Mules injured and killed — Measure of damages — Erroneous instruction.

In *GULF, COLORADO & SANTA FE RAILWAY CO. v. GILLESPIE & CARLTON*, (*Texas Civil Appeals*, March, 1909) 118 S. W. Rep. 628, appeal from judgment for plaintiffs in the Grimes County Court, in an action to recover damages for two mules killed and twenty-seven others injured while being transported by defendant, judgment for plaintiff for \$300 for mules killed and \$250 for injuries to the others, was *reversed* for errors in submission of question of damages. The court (per REESE, J.) said:

"The measure of damages for the injuries to these mules is the difference between their market value at Navasota at the time of delivery in the condition they were in and what would have been their market value at the same time and place in the condition in which they would have been if they had been transported without negligence on the part of appellant. This is the general rule, and it does not affect its application that the mules were to be kept for use and were not for sale. *G., C. & S. F. Ry. Co. v. Stanley*, 89 Tex. 44, 33 S. W. 109; *Railway Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444; *Railway Co. v. White*, 35 Tex. Civ. App. 522, 80 S. W. 641; *Railway Co. v. Thompson*, (Tex. Civ. App.) 44 S. W. 9. The jury could not apply this rule without some evidence as to this market value." * * *

"Upon the issue of damages for the loss of the two mules, the measure of damages was their market value at Navasota at the date of the delivery there." * * *

The court held that the evidence was not sufficient to authorize the submission of these issues.

Horses injured in transit — Delay — Damages.

In *CHICAGO, ROCK ISLAND & GULF RAILWAY CO., ET AL. v. JONES*, (*Texas Civil Appeals*, March, 1909) 118 S. W. Rep. 759, judgment for plaintiff in the District Court, Jack county, was *affirmed*. The case is stated by WILLSON, CH. J., as follows:

"December 5, 1906, appellee delivered to the Chicago, Rock Island & Gulf Railway Company, at Jacksboro, Tex., for transportation over its line of road, and over the Chicago, Rock Island & Pacific Railway Company's

line of road to Pueblo, Colo., twenty-nine head of horses, consigned to J. H. Jones at La Junta, Colo., a station on the Atchison, Topeka & Santa Fe Railway. The horses should have reached their destination within three or four days from the time they were received by the Chicago, Rock Island & Gulf Railway Company at Jacksboro. On account of its negligence and the negligence of the Chicago, Rock Island & Pacific Railway Company the horses did not reach Pueblo until December 14th where one of them died, and the others did not reach La Junta until December 15th. As a result of the negligence of said Chicago, Rock Island & Gulf Railway Company and said Chicago, Rock Island & Pacific Railway Company in delaying the carriage of the horses, and in roughly handling while transporting them, one of the horses died en route, and the others were injured, and appellee thereby was damaged in the sums found by the jury, and adjudged in appellee's favor by the court below."

* * *

The court said: "The measure of appellee's damages was the difference between the market value of the horses at La Junta in the condition in which they would have arrived there but for appellants' negligence and their market value in the condition in which, by reason of such negligence they did arrive there." * * *

"It appeared from the evidence that, while appellee as the owner thereof contracted for and delivered the horses to the Chicago, Rock Island & Gulf Railway Company for transportation, he in fact did not own several of the number. Appellants requested the court to instruct the jury that he was not entitled to recover damages on account of injuries suffered by the horses he did not own. The refusal of the court to so instruct the jury is complained of in appellants' fifth assignment of error. It has been repeatedly held that the shipper is entitled to recover for injuries to the property covered by his contract with the carrier, for which the latter is liable, notwithstanding the shipper did not own the property. *Ry. Co. v. Smith*, 84 Tex. 348, 19 S. W. 509; *Ry. Co. v. Klepper*, (Tex. Civ. App.) 24 S. W. 568; *Ry. Co. v. Barnett*, (Tex. Civ. App.) 26 S. W. 783; *Parks v. Ry. Co.*, (Tex. Civ. App.) 30 S. W. 708." * * *

Rehearing denied, April 22, 1909.

Live stock injured — Liability of connecting Carriers.

IN *TEXAS & PACIFIC RY. CO. ET AL. v. RANKIN*, (*Texas Civil Appeals*, April 1909) 118 S. W. 823, action brought against three railroad companies for alleged damages to a shipment of live stock, judgment for one company was affirmed, and judgment against the others reversed. The points decided are stated in the syllabus to the report in 118 S. W. Rep., as follows:

"In an action against three connecting railroad companies to recover damages to a car load of native cattle not subject to quarantine regulations, diverted to and delayed at quarantine pens, the court instructed that, if the jury found that the initial carrier delivered the cattle to the intermediate carrier 'in the usual and customary manner for the delivery of native cattle,' the burden of proof was on the intermediate carrier to show by a preponderance of the evidence that it in turn delivered the cattle to the delivering carrier 'in the usual customary manner for delivering native cattle.' *Held*, that the instruction was erroneous, as the burden was upon plaintiff throughout the trial

notwithstanding the *prima facie* case made by plaintiff; such *prima facie* case not creating a presumption of negligence.

"The rule that where a plaintiff, on whom is cast the burden of affirmatively showing negligence, has shown such a state of facts as legally constitutes a *prima facie* case, defendant is then required to rebut the *prima facie* case or be cast in judgment, does not mean that such *prima facie* case creates a presumption of negligence on the part of defendant.

"In an action against connecting carriers for injuries caused by delivering the cattle at the wrong place, an instruction that the burden of proof is upon the initial carrier to show by a preponderance of testimony that it delivered the cattle to the consignee at their destination was error, as the burden of proof was on the plaintiff to show the negligence of the carriers."

The opinion was by LEVY, J., who, after stating the points, rendered judgment as follows: "A judgment was rendered in favor of the Missouri, Kansas and Texas Railway Company, and they appear and ask affirmance of the same in their favor, which is accordingly done. The case as to the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas is ordered reversed and remanded for another trial."

Horses injured in transit — Connecting carriers — Interstate Commerce Act — Damages — Liability.

In ST. LOUIS, SAN FRANCISCO & TEXAS RY. CO. ET AL. v. FENLEY, (*Texas Civil Appeals*, April, 1909) 118 S. W. 845, judgment for plaintiff in the District Court, Tarrant county, was *affirmed*. The opinion by WILLSON, CH. J., states the case as follows:

"Appellee shipped a lot of horses from Carthage, Mo., to Ft. Worth, a distance of about 500 miles. The horses were received by the St. Louis & San Francisco Railroad Company at Carthage, and transported over a line of road controlled by it to the point where same connected with a line of road controlled by the St. Louis, San Francisco & Texas Railway Company. The latter company then transported them on and delivered them to the consignee at Ft. Worth. While transporting the horses, the carriers so negligently delayed and handled them as to depreciate their market value in Ft. Worth in the sum of \$860. In accordance with the verdict of a jury so apportioning the damages, a judgment for one-half of the sum thereof was rendered in favor of appellee against each of the carriers. The complaint made on this appeal is that the evidence showed that a greater proportion of the damages than one-half thereof was due to the negligence of the St. Louis & San Francisco Railroad Company, but otherwise did not show how much thereof was due to its negligence and how much to the negligence of the other appellant, and therefore that the finding of the jury and judgment of the court apportioning the damages as stated was contrary to the evidence, in that they were against the St. Louis, San Francisco & Texas Railway Company for one-half thereof, and not supported by the evidence, in that it was not sufficient to authorize an apportionment of the damages to be made at all." * * *

The court said that "evidence that the horses were delivered to one of the carriers at Carthage in good condition, and that they were de-

livered at their destination by the other in a damaged condition, *prima facie* was sufficient to authorize a finding against the delivering carrier for all the damages. *Gulf, C. S. F. Ry. Co. v. Cushney*, 95 Tex. 312, 67 S. W. 77, 12 Am. Neg. Rep. 199; *Gulf, C. & S. F. Ry. Co. v. Edloff*, 89 Tex. 458, 34 S. W. 414, 35 S. W. 144; *Tex. & P. Ry. Co. v. Tom Green County Cattle Co.*, 15 Tex. Civ. App. 147, 38 S. W. 1138; 3 Hutch. Car., § 1348." * * *

"As therefore the judgment in this case might have been against the St. Louis, San Francisco & Texas Railway Company for all the damages, irrespective of whether it alone or jointly with the other appellant contracted to transport the horses the entire distance from Carthage to Ft. Worth or not, it should not be heard to complain that the judgment was against it for only one-half the sum of the damages. Nor do we think the St. Louis & San Francisco Railroad Company, if it should be assumed that, by the terms of the contract, it became liable only for damages due to its negligence while handling the horses, is in a better position than the other appellant is in to complain of the judgment. The twentieth section of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), as amended in 1906 (Act June 29 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]) declares 'that any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed.' 2 Hutch. Car., p. 600. The statute quoted would have authorized a judgment against said St. Louis & San Francisco Railroad Company for all the damages found by the jury. In any view of the case, therefore, it should not any more than the other appellant be heard to complain of the judgment."

Cattle injured — Carrier liable — Damages — Interest.

In *ST. LOUIS & SAN FRANCISCO RY. CO. ET AL. v. LANE*, (*Texas Civil Appeals*, April, 1909) 118 S. W. Rep. 847, appeal from judgment for plaintiff for \$250 in the Hardeman County Court, in action for damages for alleged negligent handling of certain cattle shipped by plaintiff, judgment was *reformed and affirmed*. Opinion by FLY, J., who said:

"The court erred in rendering judgment for interest from the date of the infliction of the damages, when the jury had not found for such interest. Interest as damages might have been allowed by the jury, under proper instructions by the court; but the court could not render judgment for such damages without having a basis for the same in the verdict. The interest was not a legal incident of the sum found by the jury, and could not be added by the court. This is a matter, however, that can be remedied by this court.

"The judgment will be reformed so as to have the interest begin on May 28, 1908, the date of the judgment, and, as reformed, will be affirmed."

Rehearing denied, May 5, 1909.

Cattle injured in transit — Delay — Feeding and watering — Release by shipper — Damages — Connecting Carriers — Joint Liability.

IN *TEXAS & PACIFIC RY. CO. ET AL. v MOORE*, (*Texas Civil Appeals*, April, 1909) 119 S. W. 697, appeal from judgment for plaintiff in the District Court, Tarrant county, judgment was reversed in part and affirmed in part. The action was by appellee, Moore, against the Texas Central Railroad Company, the Texas & Pacific Railway Company, and the St. Louis & San Francisco Railroad Company, to recover damages on account of a shipment of cattle from Albany to Scullin, then in the Indian Territory. The appeal is prosecuted from a judgment rendered February 14, 1908, in favor of appellee against the Texas Central Railroad Company for the sum of \$1,056.17, and against the St. Louis & San Francisco Railroad Company for the sum of \$2,112.50. The judgment was in favor of the Texas & Pacific Railway Company against appellee, and it is not on that account complained of by any of the parties.

The opinion was rendered by WILLSON, J., who after reviewing the case and points said: "In so far as the judgment of the court below was in favor of appellee against the Texas Central Railroad Company, it is affirmed. In so far as it was in favor of appellee against the St. Louis & San Francisco Railroad Company, it is reversed, and the cause, as to appellee and said St. Louis & San Francisco Railroad Company, is remanded for a new trial."

Among the points decided, which are stated in the syllabus to the report in 119 S. W. Rep., are the following:

"Where plaintiff brought his cattle to the station relying on notice from the carrier that they could be shipped at once, and, without plaintiff's fault, they were detained in pens without food or water waiting the arrival of cars, the carrier is liable for the resulting damages to the cattle, whether or not it was negligent in notifying plaintiff to bring his cattle from the pasture at a time when it did not have cars in which to ship them.

"A release of a carrier by a shipper of 'liability for delay in shipping said stock after delivery thereof to its agent, and from any delay in receiving same after being tendered to its agent,' does not release carrier from liability for delay in the transportation after the stock was loaded.

"A release of a carrier by a shipper of live stock from liability for delay in transportation is void, in so far as it applies to delays after the stock is loaded and ready for shipment.

"Where a carrier billed a shipment of live stock to its destination, though it was only a connecting carrier, the measure of damages for injuries from delay is the difference between what would have been the market value of the cattle at their destination had there been no delay, and their market value at such place in the condition in which they arrived.

"Where severable judgments were rendered in a joint action against several defendants, a grant of a new trial as to one defendant does not set aside or affect the judgment as to the other defendant.

"Where several railway companies were sued jointly for damages to a shipment of cattle, but plaintiff did not allege them to be partners or in any manner jointly liable, a judgment in favor of one, to set aside

which no action was taken, is conclusive on plaintiff, though a new trial was granted as to that part of the judgment which was against another defendant."

Rehearing denied, May 20, 1909.

Cattle injured and killed — Carrier liable — Damages.

IN MISSOURI, KANSAS & TEXAS RAILWAY CO. OF TEXAS ET AL. *v.* PETTIT, (*Texas Civil Appeals*, March, 1909) 117 S. W. 894, judgment for plaintiff in the Williamson County Court, was *affirmed*. The case is stated in the opinion by RICE, J., as follows:

"Appellee brought this suit against appellants for the recovery of damages sustained by him to a shipment of 159 head of beef cattle while in transit over appellants' line of railway from Smithville, Tex., to East St. Louis, Ill., alleging unreasonable delays and rough handling en route, whereby he sustained damage to said shipment in the aggregate sum of \$901.04, predicated upon the killing outright of one of said animals, the crippling of another, and decrease in weight of the others, depreciation in the market on account of reaching the same one day late, as well as depreciation in their value on account of the stale appearance of said cattle when they arrived. Defendants filed a general demurrer, general denial, and several special answers, among other things setting up contributory negligence on the part of plaintiff in failing to properly care for said cattle en route, in accordance with his contract so to do, and pleading that section of their contract limiting their liability to injuries occurring on their own lines, and requiring notice to carrier of injuries before cattle were taken from the cars or mingled with other stock, etc. And further contended that, if the said cattle were injured by reason of delay and rough handling, defendants were not liable therefor, because the same was only such as was ordinarily incident to the operation of their trains. Plaintiff addressed special exceptions to those portions of said answer which set up contributory negligence, and that part thereof requiring shipper to give notice of any injuries resulting to stock on account of the carrier's negligence before the cars left the carrier's line, and before the stock mingled with other stock, or were removed from pens at destination, which exceptions were sustained. There was a jury trial, resulting in a verdict and judgment for plaintiff for \$376, with interest thereon, from which judgment this appeal is prosecuted." * * *

Cattle injured — Delay in furnishing cars — Measure of damages.

IN CHICAGO, ROCK ISLAND & GULF CO. *v.* KAPP, (*Texas Civil Appeals*, March, 1909) 117 S. W. 904, judgment for plaintiff for \$301.25 in the District Court, Jack county, was *reversed*. Opinion by WILLSON, CH. J. The case is stated in the syllabus to the report in 117 S. W. Rep., as follows:

"In an action against a railroad company for damages for delay in furnishing cars for shipping cattle, it was error to allow plaintiff to testify as to the depreciation between the market value of the cattle in a lump sum at their destination when they arrived, and in the condition in which they arrived, and their market value there at the time they should have arrived, and in the condition in which they would have been but for the delay in furnishing cars, where it did not appear that he had any

knowledge of the market value of cattle at the place in question, though he had been in the cattle business about fifteen years, and where there was no evidence from any source as to such market value.

"In an action against a carrier for damages for delay in furnishing cars for transportation of stock, where there was evidence that there were cars for the cattle on the day they were promised, but no engine to pull them; that an engine arrived the next morning, and they could have been shipped then if plaintiff's agent had not ordered that, if they could not be shipped that night, they should be held until the night of the next day, so that they could be fed and watered — plaintiff cannot recover damages for that part of the delay caused by complying with the instructions of plaintiff's agent."

Horses and mules injured — Negligent handling of cars — Delay in transportation — Damages — Remittitur.

In *ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. ALLEN*, (*Texas Civil Appeals*, March, 1909) 117 S. W. 923, judgment for plaintiff in the District Court, Camp county, was *conditionally affirmed*. Rehearing denied, April 1, 1909. The facts are stated in the opinion by LEVY, J., as follows:

"Appellee sued appellant company for damages for injuries to a shipment of horses and mules from Pittsburg, Tex., to Corsicana, Tex., alleged to have resulted to them from negligent handling of the cars and delay in transporting the stock by the appellant. The appellant answered by general denial, and specially pleaded that the shipment was made under a contract in writing, excepting it from liability except for negligence, and providing that appellee assume the risk of watering and feeding the stock. The case was tried to a jury, and in accordance with their verdict a judgment was rendered for the appellee. The evidence substantially shows that appellee delivered to the appellant company at Pittsburg, Tex., in the early morning of October 4, 1907, twenty-five horses and mules for shipment to Corsicana, Tex. While en route, and near Athens, Tex., the train bearing the live stock was derailed on account of some defect in the track, but the car in which the live stock were did not entirely get off the track — only the fore trucks of the car got off. The train was delayed for some hours in clearing this wreck. The live stock were delivered to the appellee at destination, at about twelve o'clock A. M., October 6, 1907, being about sixty hours from the time of shipment. It was shown by the evidence that the stock should have arrived at their destination, by ordinary schedule time of the train, in about twelve hours. Some of the horses in the shipment were shown to have been of extra fine breeding and value. There is evidence showing that all the stock sustained injuries in the transportation, and that some of them sustained severe injuries. The evidence is sufficient to sustain the finding of the jury that the company was guilty of negligence as complained of in the petition, and that the negligence was the proximate cause of the injuries to the stock, and is sufficient to sustain the amount of damages awarded in the verdict, except as to the amount allowed for the feeding and watering of the stock. The shipment appears to have been made under a contract in writing, providing that the live stock covered by this contract were not to be delivered within any specified

time, nor at any particular hour, nor for any particular market, and that the railway company was exempted from liability for loss or damages, except that arising from its negligence, and that the appellee assumed all risk of watering, feeding, and bedding the stock while in the cars or the yards or pens; and we do not think the evidence in the record, under this contract, supports any finding of insufficient watering and feeding, or denial of the privilege to do so, by the appellant to the appellee." * * *

The amount of \$250 for failure to sufficiently feed and water stock was improperly recovered. On filing of remittitur of that amount judgment to be affirmed for balance of verdict.

Horses and mules injured—Delay in transportation—Feeding and watering—Excessive damages—Measure of damages.

In *MISSOURI, KANSAS & TEXAS RY. CO. OF TEXAS v. LIGHT ET AL.*, (*Texas Civil Appeals*, March, 1909) 117 S. W. 1058, judgment for plaintiffs in the District Court, Denton county, was reversed for excessive damages. HODGES, J., in his opinion said:

"The appellees owned twenty-eight head of horses and mules in Denton county, which, in December, 1906, were shipped over the appellant's line of road to San Antonio, and thence over the International & Great Northern to Cotulla. The stock were loaded into a car at Pilot Point on Wednesday, and reached their destination on the following Monday night. This suit is to recover damages for delay, rough handling, and failure to properly water and feed the stock while in transit over the appellant's line. Upon the trial before a jury, the plaintiffs in the case recovered a judgment for \$533."

The court said that it should have been left to the jury to determine whether or not the injuries were sufficient to affect the market value of the stock, and it was error to charge that if the animals were injured because of defendant's negligence plaintiff was entitled to recover on this item of their claim, there being evidence that some of the stock were sold within a very short time after their arrival at prices in excess of what one of the plaintiffs had testified would be their market value had they arrived in proper condition.

The liability of a carrier of live stock for injury to the stock is the difference between the market value of the stock in the condition in which they arrived at destination and the market value in the condition in which the stock should have arrived as may have been caused by the carrier's negligence.

On the question of excessive damages the court said:

"There were twenty-six horses and mules in the car when they arrived at Cotulla; two mules having been sold on the way by the man in charge. One of the appellees testified that some of the stock were skinned, bruised, and injured when they arrived, while others say that all of them were in that condition. How much of this condition was due to the negligence of the appellant's servants, and how much resulted incidentally and necessarily from being transported that distance in a railway car, is purely a matter of conjecture under the evidence. Two of the witnesses for plaintiffs below testified to specific injuries to three of the animals, but did not undertake to say what was the amount of damages resulting

from those particular injuries. D. W. Light, one of the appellees, says that the stock would have been worth in that market \$130 per head had they arrived in proper condition, that they were worth only ninety dollars per head in the condition in which they did arrive, and thus places forty dollars per head as a general average of the damages sustained. There was nothing to enable the jury to assess the damages to any one or more of the animals at a greater or less amount than the average named by Light. The correctness of his estimate is so strongly challenged by his subsequent admissions, and those of his co-plaintiffs, that its probative value as a basis for a verdict may be seriously questioned. It is admitted that, a very short time after the stock arrived at Cotulla, eight head of them were sold for \$1,100, or \$7.50 per head more than Light estimated their market value would have been had they arrived in good condition, and \$47.50 more than he stated their market value actually was upon their arrival. There is nothing in the evidence to show that the animals sold were injured less than the others, or that their market value was greater at that time. The average of those sold thereafter was also above the value fixed by Light. It was also admitted that four of the mules which were unsold at the time the deposition of the witness was taken were held at \$275 per pair. This would leave only five head whose value were unaccounted for, thus showing by the evidence that twenty-one of the animals had been erroneously estimated by Light to have been damaged to the extent of forty dollars per head. Could the jury say that these five were each damaged to the extent of over \$100, as they must in order to sustain their finding? We think not. It is true some of these animals were priced some time after their arrival at their destination, and appellees contend that these values should not be taken as a basis of measuring their damages. We think that it is true and are not undertaking to use it for that purpose; but we refer to it simply to show how unreliable and inadequate was the testimony upon which the jury had to rely in estimating the damages in the case. There was nothing to show that the market value of the stock had changed during the time intervening between their arrival and when the animals were subsequently sold, or that any expense was incurred to get them in a better marketable condition. The evidence merely shows that they were turned into a large pasture and were kept there until sold." * * *

Delay in transportation of cattle — Connecting carriers — Liability.

In *MISSOURI, KANSAS & TEXAS RAILWAY CO. OF TEXAS ET AL. v. ROGERS*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 738, judgment for plaintiff in the Llano County Court was reversed and affirmed in part. The opinion by FISHER, CH. J., is as follows:

"This is a suit by appellee, Rogers, against the Houston & Texas Central Railroad Company, the Missouri, Kansas & Texas Railway Company of Texas and the Missouri, Kansas & Texas Railway Company, to recover damages in the sum of \$445, alleged to have been sustained to a shipment of two car loads of cattle from Llano to Kansas City on July 18, 1907. The case was tried before the court without a jury, and judgment rendered in plaintiff's favor against the Houston & Texas Central Railroad Company for fifty dollars, with six per cent interest from date

of delivery of cattle and against the Missouri, Kansas & Texas Railway Companies jointly for \$300.

"There is no evidence whatever in the record that would justify the judgment against the Houston & Texas Central Railway Company. The cattle were transported by this company from Llano, Tex., to Elgin, Tex., and there delivered to its connecting carrier, the Missouri, Kansas & Texas Railway Company of Texas. It is not claimed by the appellee that there was any special contract with reference to the time of transportation of this shipment, nor that any special train was to be furnished to carry these two cars of cattle. It appears from the appellee's evidence that he understood that the cattle were to be shipped on the regular freight train that left Llano in the morning, and he knew of the run of that train, and knew that it was laid over in Austin, and knew about the time that it would reach Elgin; and it is admitted by his witness who accompanied the shipment that there was no rough handling of the cattle between those points. There was no unreasonable delay shown at Llano. It left there at the usual time in the morning, and reached Austin at the usual time in the evening, and left Austin at the usual time at night, and arrived at Elgin at the usual time, and was there delivered to its connecting line, the Missouri, Kansas & Texas. No unreasonable delay was shown in making this run. It is true, the train remained at Burnet an hour and a half, but no injury is shown from that delay. Whether it remained there longer than usual or longer than was necessary is not made to appear; but, assuming that the train did remain there a longer time than necessary, no injury is shown from this fact, because it is not claimed that the cattle remained in the cars a long time by reason of that fact, or that there was any expectation or intention to remove the cattle from the cars and to give them feed, water, and rest before the same were delivered to the Missouri, Kansas & Texas at Elgin.

"There is evidence in the record which would justify the judgment against the Missouri, Kansas & Texas for some amount, but we are not able from the facts stated in the record to determine that this amount is the sum found by the judgment of the trial court. The evidence upon this subject is uncertain, and there is a statement in appellants' brief that this amount cannot be ascertained to be more than \$208.39, and in view of this statement we will say that, if the appellee will remit his judgment against the Missouri, Kansas & Texas to this sum, we will here reform and render for that amount, but otherwise the judgment will be reversed on account of the assignment that the evidence does not sustain the judgment for the amount determined in appellee's favor.

"The conclusion reached by this court with reference to the Houston & Texas Central being based in the main upon the evidence of appellee and his witness, and it appearing that the testimony upon this subject is fully developed, the judgment as to that road is reversed and here rendered to the effect that as against it plaintiff take nothing, and that that appellant go hence with its costs.

"The judgment as to the Missouri, Kansas & Texas Railway Company will be reversed, with the privilege of the appellee within fifteen days, if he so desires, to remit to the amount of \$208.39, and if so done it will be

affirmed at appellee's costs; otherwise the judgment as to these two roads will be reversed, and the cause remanded."

See, also, report in 116 S. W. 624, (Mo., K. & T. Ry. Co. of Texas et al. v. Rogers), which relates to question of practice on an application by defendants for certiorari to complete the record.

In *HOUSTON & TEXAS CENTRAL RY. CO. ET AL. v. ROGERS*, (*Texas Civil Appeals*, February, 1909) 117 S. W. 1053, judgment for plaintiff in the Llano County Court was reversed on rehearing. The opinion was rendered by LEVY, J., and the case was stated as follows:

"By his petition appellee sought to recover damages for negligent delay in the handling of a shipment of calves originating at Llano, Tex., on July 8 1906, and terminating at Ft. Worth in the afternoon of the following day; the shipment being over the respective lines of the two appellants. The case was tried before the court without a jury." * * *

"The court finds that 'the defendants did not transport and deliver said cattle within a reasonable time and with ordinary care, but negligently delayed the same in transportation, and carelessly and negligently handled said stock while being transported by them, respectively, the direct and proximate result of which was to cause said stock to excessively shrink in weight, to become stale in appearance, and to have them encounter a drop in the market, all to such an extent that said cattle, at the time and in the condition they were delivered at destination, were of less value than they would have been, had they been transported and delivered within a reasonable time and with ordinary care, to the extent of \$394.' In the absence of a statement of facts, we are not prepared to hold that the finding was erroneous, or without evidence to support the same, or that the amount allowed was excessive."

On rehearing the court held that the assignments of error complaining of the amount of verdict at being excessive under the pleadings and evidence should be sustained.

"Under the proof, limited by the allegations, the total amount appellee could have recovered was, with interest, \$354.22, which is \$68.13 less than the amount of the damages awarded by the court. Ordinarily, where an improper element of damage has been allowed, if the amount claimed can be segregated from the verdict or finding, the judgment will not be remanded, but may be modified by remittitur and then affirmed. But in this case the court below has not awarded judgment jointly against the two appellants for the total amount found due, but has awarded to the plaintiff a recovery separately against the defendants in the distinct amounts that each was so found liable for. There is nothing in the evidence by which we can arrive at the correct amount that each appellant would be liable for, and hence we cannot correct an excessive amount by awarding to each a portion thereof if remitted. We cannot say that one appellant should be credited with the whole of the excess, or what portion of the excess each should be allowed. To do so would be simply an arbitrary act. Neither, in the absence of an express agreement on the part of the appellee, could we say that the total amount of the excess should be allowed each appellant in remittitur. In this attitude the case will have to be remanded for another trial."

Hogs injured in transit — Default judgment — Jurisdiction.

In *PECOS & NORTHERN TEXAS RAILWAY CO. v. FAULKNER*, (*Texas Civil Appeals*, April, 1909), 118 S. W. 747, appeal from a default judgment for plaintiff in the Hale County Court, judgment was reversed. The case is stated in the opinion by WILLSON, CH. J., as follows:

"The suit was commenced in a justice court to recover the sum of \$98.65 as damages appellee alleged he had suffered to a shipment of hogs, as the result of negligence on the part of appellants. From a judgment rendered by that court in appellee's favor for said sum of \$98.65, against both the appellants, the latter prosecuted an appeal to the county court, and from a judgment by default rendered by the latter court in favor of appellee for a like sum and six per cent interest thereon from December 30, 1907, to April 20, 1908, against both the appellants, they prosecute this appeal.

"The first question to be considered is the one made by appellee in his motion to dismiss the appeal, on the ground that this court is without jurisdiction to hear and determine it, because, he insists, the judgment rendered by the county court on the appeal to it from the justice court was for less than \$100, exclusive of interest and costs. Sayles' Ann. Civ. St. 1897, art. 996, subd. 3. In *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 378, in construing the provision of the Constitution conferring upon county courts 'concurrent jurisdiction with the district courts when the matter in controversy shall exceed \$500 and not exceed \$1,000 exclusive of interest,' the Supreme Court held the 'interest' referred to to mean interest *eo nomine* given by a statute, and not to mean interest recoverable as an element of damages for a tort. In *Railway Co. v. Fromme*, 98 Tex. 459, 84 S. W. 1055, the plaintiff had sought a recovery of the sum of ninety-five dollars and interest thereon as damages suffered by him as the result of a negligent delay on the part of the defendant to furnish cars in which to load and ship certain horses. The plaintiff recovered a judgment for the sum of \$28.04, from which the defendant prosecuted an appeal to the Court of Civil Appeals, when that court certified to the Supreme Court, with others, the following question: 'Does the pleading of plaintiff state an amount within the appellate jurisdiction of this court?' The question was answered as follows: 'The statement which accompanies the certified questions in this case fails to show when the cause of action accrued, or the date of the trial in the county court. Hence we are unable to answer the first question categorically, but reply thereto that if, at the date of the trial in the county court, six per cent per annum added to the ninety-five dollars, stated as damages, would have amounted to more than \$100, then either party had a right to appeal from that judgment, because the amount in controversy was the full sum that the plaintiff could recover under the allegations of his petition.' The ruling of the Supreme Court in the two cases referred to we think is conclusive of the question made by appellee in his motion to dismiss this appeal. While by his pleadings in the court below he sought a recovery of the sum of \$98.65 only, and did not seek a recovery of interest thereon, the judgment in his favor was for interest as well, which, added to the principal sum, made a total of \$100.45 for which the judgment was rendered. Treating the sum adjudged as interest as an element of damages recover-

able, in a sense different from that meant by the word 'interest' as used in the provisions of the Constitution and laws conferring jurisdiction on the courts of this State, the appeal is from a judgment for a sum exclusive of 'interest' in excess of \$100, and this court therefore has jurisdiction to hear and determine it. *Railway Co. v. Hunt*, 38 Tex. Civ. App. 460, 85 S. W. 1168; *Railway Co. v. Everett* (Tex. Civ. App.) 95 S. W. 1085; *Railway Co. v. Addison*, 96 Tex. 61, 70 S. W. 200." * * *

The court also held that the facts shown were sufficient to excuse the attorneys for the defendants for failure to reach the court in time to be present when the cause was disposed of, that they used proper diligence in presenting their motions to have the judgment by default set aside, and that the trial court failed properly to exercise the discretion belonging to it as such. Judgment reversed and cause remanded for new trial.

On the question of a default judgment which was reversed and remanded on the ground of defendant's counsel not being able to reach court in time for trial, see, also, *PECOS & NORTHERN TEXAS RY. v. PEARCE*, (*Texas Civil Appeals*, March, 1909) 117 S. W. 911, appeal from default judgment in the Hale County Court, in action for damages alleged to have been occasioned to a shipment of cattle.

See, also, *PECOS & NORTHERN TEXAS RY. CO. ET AL. v. EPPS & MATSLER*, (*Texas Civil Appeals*, March, 1909) 117 S. W. 1012, where a default judgment in the District Court, Hale county, in action for damages for alleged negligent handling and delaying a shipment of cattle, was reversed. The general denial of the defendants being on file, it was incumbent on plaintiffs to prove liability as well as amount of damages. A simple judgment by default cannot legally be taken where answers of the defendant are on file." Opinion by LEVY, J.

Horses injured in transit — Connecting carriers — Liability.

In *MISSOURI, KANSAS & TEXAS RY. OF TEXAS ET AL. v. LAWSON*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1155, judgment for plaintiff in the County Court was affirmed. The action was by Lawson against the Missouri, Kansas & Texas Railway Company of Texas and the Texas & New Orleans Railway Company to recover of appellants damages in the sum of \$900 on account of the careless and negligent handling and delay on the part of appellants of two car loads of horses, shipped by appellee from New Braunfels, Tex., to Orange, Tex. The horses were transported from New Braunfels to Houston over the Missouri, Kansas & Texas Railway, and from the latter place to Orange over the Texas & New Orleans Railroad. The case was tried before the court without a jury, and judgment rendered in favor of the plaintiff against the "Katy" Company for \$750, and against the Texas & New Orleans Company for \$150. Opinion by FISHER, CH. J.

Rehearing denied, May 26, 1909.

Car load of calves injured by delay of transportation — Damages.

In *ST. LOUIS, SAN FRANCISCO & TEXAS RY. CO. ET AL. v. ADAMS*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1155, judgment for plaintiff in the Hardeman County Court was affirmed. Plaintiff brought "suit against the St. Louis, San Francisco & Texas Railway Company and the St. Louis & San Francisco Railway Company to recover \$743.30 damages to a shipment of 300 head of calves delivered to defendants at Quanah, Tex., on the 20th of

October, 1907, to be transported thence over their road to St. Louis, Mo., and there delivered to their connecting carriers, to be carried from there and delivered to plaintiff at Coshocton, Ohio. The negligence charged against defendants was delay and rough handling between Quanah and St. Louis by reason of which the animals' value was diminished one dollar per head, and that one car containing sixty-two head of the calves were unloaded en route at Sapulpa by defendants, and negligently placed in their quarantine pens at their yards at that station, in consequence of which they could not be lawfully carried to their destination, and were sold by defendants at St. Louis for \$12.50 per head, and that had it not been for such negligence, they would have been carried to Coshocton, where they would have brought \$20, whereby plaintiff lost \$7.15 per head on said car load of calves. The defendants answered by a general denial, and pleaded specially certain stipulations in the contract of affreightment in limitation of their common-law liability as common carriers. The trial of the case resulted in a verdict and judgment against the defendants for the damages sued for." Opinion by NEILL, J., who on the conclusions of fact, said:

"The evidence was reasonably sufficient to warrant the jury in finding that the defendants were guilty of delay and of negligent handling of the calves in transportation between Quanah and St. Louis, and that, by reason of such negligence, the market value of those which arrived at Coshocton, Ohio, was one dollar less per head in their damaged condition than it would have been had it not been for such negligent delay and rough handling.

"The evidence shows beyond question that one car load of sixty-two head of the calves was negligently placed by the defendants in their quarantine pens at Sapulpa, by reason whereof they could not be delivered to plaintiff at Coshocton, but were sold by defendants at St. Louis and brought \$7.50 less per head than they would have sold for at their destination had they been transported there with the other part of the shipment, and of the proceeds of sale \$681.22 were paid to plaintiff."

Rehearing denied, May 12, 1909.

Cattle injured — Delay — Evidence.

In *TEXAS & PACIFIC RY. CO. ET AL. v. GOLDSMITH & GARRETT*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1146, judgment for plaintiffs in the Midland County Court was *reversed*, the opinion by LEVY, J., being as follows:

"The suit was to recover damages for the alleged negligent handling and delay en route of a certain shipment of cattle. In accordance with the verdict of a jury, judgment was entered in favor of the appellees.

"The appellants each, in the second assignment of error, complain of the admission of certain evidence in the trial of the case. One of the appellees, testifying as a witness, was allowed by the court, over the objection of the appellants, to state his opinion as to 'what is a reasonable run with cattle from Midland to Ft. Worth over the Texas & Pacific Railway, and from Ft. Worth to Kansas City over the Missouri, Kansas & Texas Railroad.' It has been ruled in case of *Railway Co. v. Noelke* (Tex. Civ. App.) 110 S. W. 82, that similar testimony was improper and inadmissible. Also, see *Railway Co. v. May* (Tex. Civ. App.) 115 S. W. 900." *Reversed and remanded*.

Horses injured — Delay in transit — Contract — Limiting liability.

In *JOLLIFFE v. NORTHERN PACIFIC R. R. Co.*, (*Washington*, April, 1909) 100 Pac. 977, judgment for defendant in the Superior Court, King county, was reversed. DUNBAR, J., stated the case as follows:

"On September 27, 1907, the plaintiff shipped a car load of horses at Grafton, N. D., to be transported over the lines of the Northern Pacific Railway Company to Seattle, Wash. The shipment reached its destination on October 13th, having been en route about sixteen days. This action is for damages for injury to the horses, most of the damages being alleged to have been caused by the delay of the cars; it being conclusively shown that the cars were unduly delayed. It is not necessary to mention specifically the particular delays charged. The shipment was under a written contract and it is the contention of the plaintiff that the delays, being unreasonable, were due to negligence of the defendant; that the horses shrunk an unusual amount by reason of these delays, thereby depreciating in value, and necessitating their being cared for from one to three months before they were fit to sell. At the close of plaintiff's case the court granted defendant's motion for a nonsuit, and thereafter overruled plaintiff's motion for a new trial." * * *

"The stipulation referred to in the contract is to the effect that the shipper assumes all the risk of damage he may sustain by reason of any delay in such transportation. Some cases are cited by the respondent which sustains this contention; but they are not founded on reason or justice and we are therefore not inclined to follow them. It will be seen from this contract that this is, in effect, if construed as it has been construed by the respondent, a contract relieving the shipper from its own acts of negligence, thereby running directly counter to the first clause in the contract, which reads as follows: 'The company shall not be liable for the loss or death of or injury to the stock unless the same is caused by the negligence of the company, its agents or employees.' So that it will be seen that this contract recognizes the general principle that the carrier has no right to relieve itself by contract against acts of negligence on its part. The reason we say that the provision relied upon by the appellant is in effect, a provision where an attempt is made to contract against negligence is that there would be no way, if this provision were literally construed, by which the shipper could show negligence, because he has made himself actually responsible for all damages which may be sustained by reason of any delay in the transportation." * * *

"This court and other courts have frequently said that, where it is necessary to make a character of proof which, by reason of the circumstances surrounding the case is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof, and that is exactly the case here. This rule, which it is admitted by the respondent applies under the ordinary contracts, was no doubt based upon the reasons which we have just assigned. The reason for the rule has not in the least been changed by the modification in the contract, for the cause of the delay is just as difficult to prove, and just as much without the knowledge of the shipper and within the knowledge of the carrier, as it was under the regular contract. The fact that risks are assumed by the shipper which

were not assumed under some other contract can in no way affect the rule or the reason for it." * * *

"The trial court was of opinion that the proof of damages was not sufficiently definite to enable the jury to determine the amount thereof. But while the proof of damages in many respects was somewhat cloudy, there certainly was testimony to the effect that by this unusual delay an unusual amount of shrinkage of all the horses would occur, and that they would have to be kept a longer time before they could be sold, and the testimony was definite and certain that all the horses had to be fed and cared for this extra length of time, and that it actually cost the respondent at the rate of fifteen dollars a month for such extra care and keep."

Loss of horses and cattle — Contract — Stock pens — Duty and liability.

In *BUCK ET AL. v. OREGON RAILROAD & NAVIGATION CO.*, (*Washington*, May, 1909) 101 Pac. 491, judgment for defendant in the Superior Court, Spokane county, in action to recover for loss of six head of horses, and the expense of gathering fifty-seven head of cattle, which escaped from the stock pens belonging to defendant, was *reversed*. The case is stated in the opinion by MOUNT, J., as follows:

"It appears from the plaintiffs' evidence, that the defendant is a common carrier of freight; that on May 7, 1907, the defendant agreed to transport two car loads of live stock, consisting of fifty-seven head of cattle and six head of horses, from Colfax, in this State, to Innisfail, Alberta, Canada. The stock was delivered to the defendant on May 8th, and loaded on its cars at Colfax on that day. About the time the stock was loaded on the cars plaintiffs signed a contract, which provided, among other things, as follows: 'The shipper agrees to inspect the cars in which such stock is to be transported and any yards or inclosures on the premises of the railroad company into which said stock may be unloaded and satisfy himself that they are sufficient and safe and in proper order and condition, and shall report to the agent or employees of said carrier any visible defects therein and demand necessary repairs before proceeding to occupy said cars or inclosures, and the fact of his loading said stock into said cars or occupying said inclosures shall be an acknowledgment and acceptance by him of the sufficiency and suitability in every respect of said cars and inclosures for shipment and yarding thereof.' After the stock was loaded into the cars the train left Colfax at about ten o'clock in the forenoon of May 8, 1907, and arrived at Spokane at about ten o'clock that night. Plaintiffs requested the defendant to take the cars to the stock pens of the company located about two miles out of the city of Spokane, so that the stock might be unloaded for food, rest, and water. The defendant thereupon transferred the cars to the stock pens, where they arrived at about one o'clock at night. All the pens were full of stock, except one. The stock was unloaded into this pen. Mr. Buck, one of the plaintiffs, thereupon walked around the pen on the walking board on top of the pen. He examined the gate by looking at the same, and shaking it with his foot. He saw that it was fastened. It 'appeared sufficient,' and the stock were left there for the night. All the parties returned on the engine to Spokane for lodging for the night. The next morning at six o'clock they returned to the stock pens,

and found all of the cattle and horses gone. The cattle were gathered again by the plaintiffs within a few days, but the horses were not found. The fastening for the gate was a common iron hook. The shank of this hook was bent, so that, when the gate was apparently secure, the pressure of the gate from the inside would cause the hook to fly out of the staple and let the gate swing open. It was shown that this hook and gate had been in that condition for some time prior to the time the stock were placed in the pen. No chain or other fastening for the gate had been provided by the railway company. Upon substantially these facts the trial court was of the opinion that the plaintiffs failed to comply with their contract of shipment, because they did not examine the inclosure sufficiently to notice apparent defects therein; that the gate fastening was apparently deficient and could have been easily discovered, and that it was plaintiffs' duty under the contract to make the discovery, and for that reason granted the nonsuit, and dismissed the action. We think the trial court erred in this ruling. If this provision of the contract is valid, it is so because it does not relieve the carrier of its common-law duty to furnish proper facilities for, and to safely transport, the appellants' property, and also because it is not an attempt to limit its common-law liability so as to exempt the carrier from the consequences of its own negligence, or that of its servants. 'The carrier is bound to furnish good and sufficient stock pens and yards at its depot for the shipment of cattle and other live stock, and such other facilities as may be necessary for the safe and convenient loading of the stock. The shipper is entitled to recover for all damages sustained by his property in consequence of a failure by the carrier to furnish such facilities, or to keep them safe, and the carrier cannot be relieved from such liability by showing that the shipper saw the stock pens, or knew of the defects in them.' 5 Am. & Eng. Enc. Law (2d ed.), p. 430, and authorities there cited."

* * *

"We think the provision of the contract above quoted can be construed only as requiring the shipper to assume liability when the defect is known, or is plainly apparent and visible to a casual observer, which was not the case here. The trial court was apparently of the opinion that it was the duty of the shipper to make a careful inspection, such as is required of the carrier, and to discover defects. But this, as we have seen above, is not a correct interpretation of the contract. The evidence was sufficient to go to the jury upon the question of negligence of the shipper." * * *

Evidence was held to be sufficient to go to jury as to whether or not the defective latch was the cause of the loss of the stock, and nonsuit was error.

Maltreatment of horses in transit — Failure to furnish food and water — Liability of carrier.

IN *PIERSON ET AL. v. NORTHERN PACIFIC RY. CO.*, (*Washington*, April, 1909) 100 Pac. 999, judgment of nonsuit in the Superior Court, Spokane county, in an action to recover damages for alleged maltreatment of certain horses shipped over defendant's road, was *reversed*. The facts are stated in the opinion by FULLERTON, J., as follows:

"The facts appearing in the record at the time the nonsuit was granted were in substance these: On the first days of August, 1906, Victor Pierson, one of the appellants, purchased from a ranchman living near Dillon, Mont., eighteen head of draft horses and one driving horse, intending them for use in the business of logging conducted by himself and his brother at Priest River, Idaho. The horses were taken from the ranches of the person from whom they were purchased on the day of August 6, 1906, and driven, a part of them eight miles and a part of them six miles, into Dillon and loaded on an ordinary stock car at about six P. M. in the afternoon of that day. From Dillon they were carried during the night of August 6th to Silver Bow, Mont., where they arrived in the early morning of August 7th, probably between four and five o'clock. At that place the horses were turned over to the respondent for shipment to Sandpoint, Idaho, and were carried by the respondent to that point in the same car on which they were originally loaded. The shipment reached Sandpoint between three and four o'clock in the afternoon of August 8th, having been on the way upwards of forty-five hours. The animals were without food of any kind during the entire trip, and eleven of them were without water; the other eight having been given a small quantity at Reed's station on the afternoon of August 7th by Victor Pierson, who accompanied the shipment. Nor were the animals unloaded for rest, feed, or water during the trip, although requests were made of the parties in charge of the train and of the train dispatchers and station agents at different points along the way that the car be sent to the stock-yards so that the animals could be taken out, rested, watered, and fed. On reaching Sandpoint, the animals were at once removed from the car and taken to a nearby barn, where they were given a small quantity of water. Later on another small quantity of water was given them with a light feed of timothy hay, about five pounds to the team, and still later more water, but not any considerable quantity even at that time. It was testified that the water was pure, being taken from the stream out of which the inhabitants of Sandpoint obtained water for household purposes, and that the hay was very good, being bright and clean. The owners left the horses at about eleven o'clock at night of the evening of their arrival, when they all seemed to be in good condition, other than they appeared very tired, a symptom they had manifested when removed from the car and for a considerable time before their removal. One of the owners returned to the horses at four o'clock in the morning, when he found one of the animals down and suffering great pain. Effort was made at once to relieve it, but without success, and it died in the early morning. In the meantime others of the animals became sick in the same manner until all of them were afflicted, and during the day and night following ten more of them died, although the aid of a veterinary surgeon was called, and such remedies as he prescribed administered. The animals dying were the ones, according to the testimony of Victor Pierson, that received no water while being carried on the car. The evidence is not very clear as to the symptoms manifested by the horses preceding their death, but it can be gathered therefrom that they suffered great pain in the region of the bowels; that their breathing was hard and labored; that they had fever, and diarrhœa quite marked and severe. The

animal, as the disease progressed, would throw himself and thrash about, beating and bruising his head, and soon become too weak to rise, when death would soon follow. A veterinary surgeon called as an expert, although not the veterinary who attended the animals while sick, gave it as his opinion that the animals died of enteritis or gastro-enteritis, which he described as an inflammation of the intestinal tract, caused by some irritant taken with the food or drink. He stated, further, that this irritant could be either chemical or bacterial, and would operate more readily and fatally on animals whose vitality was low by reason of their having been deprived of water and food for a considerable length of time; that the treatment accorded these animals after being taken from the car, while not the best, was good; and, further, what obviously must be the case, that pure water and good hay, fed to an animal weak from fasting and fatigue, if not in undue quantities, will not hurt him." * * *

The court held that the evidence showed negligent treatment of the animals on the part of defendant.

On the question of proximate cause, the court said: "If the negligence of the defendant so far lowered the vitality of these animals as to render them susceptible to attacks by disease, and that while in their weakened condition they were unwittingly exposed to disease by the owners in their endeavor to bring them back to a normal condition, and because of such exposure and their weakened condition they sickened and died, the respondent's negligence must be held to be so far a proximate cause of the injury as to render it liable in damages therefor. Whether or not the evidence justified this inference we think was a question for the jury."

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY v. KELLER.

Supreme Court, Arkansas, April, 1909.

CARRIER OF GOODS—CONTRACT—NOTICE OF DAMAGE—

A contract of shipment specifically provided that, before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after arrival of goods at destination and their delivery. *Held*, that such provision did not affect the liability of the carrier caused by the act of injury or of negligence nor did it limit the common-law liability of the carrier nor exempt the carrier from liability for negligence, but was a regulation which the parties agreed should be a condition to a recovery, and was valid.

CARRIER OF GOODS—CAR LOAD OF PEACHES DAMAGED—CONTRACT—NOTICE OF DAMAGE—FAILURE TO GIVE NOTICE—CARRIER NOT LIABLE.—A provision in a contract of shipment that before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after arrival of goods at destination and their delivery was a reasonable one, and no notice having been given within the time mentioned, recovery could not be had in an action for damage to goods.

Applied, in an action for damages to a car load of peaches shipped over defendant line and connecting roads, where it appeared that the consignee had receipted for the peaches as in good condition the day following the delivery. Plaintiff alleged that their damaged condition resulted in sale at greatly reduced price, but he failed to give the notice required under the contract (1).

APPEAL from Circuit Court, Crawford County.

ACTION by W. F. Keller against the St. Louis & San Francisco Railroad Company. From judgment for plaintiff, defendant appeals. The facts appear in the opinion. *Judgment reversed and dismissed.*

W. F. EVANS and B. R. DAVIDSON, for appellant.

FRAUENTHAL, J. This is a suit instituted by the plaintiff, W. F. Keller, against the defendant, St. Louis & San Francisco Railroad Company, for a recovery of damages to a shipment of peaches. It is alleged in the complaint that on July 20, 1907, the plaintiff delivered to the defendant at Van Buren, in the State of Arkansas, 515 crates of peaches, and that the defendant by its written contract of shipment agreed to carry same to New York in the State of New York and there deliver same to D. T. Goldsmith. It is alleged that the peaches were greatly damaged on account of the unnecessary and unreasonable delay in their transportation, and by the neglect and failure to properly and sufficiently ice and keep iced the refrigerator car in which the peaches were carried, so as to preserve and keep them sound and firm. In its answer the defendant interposed a number of defenses to a recovery in this case. It pleaded that from the complaint it does not appear that any damage was done to the shipment on defendant's line of railroad, and that the plaintiff seeks to recover from defendant damages to the peaches which occurred on the line of railroad of another and connecting carrier, under the provisions of the Act of Congress commonly known as the "Hepburn Act," and which was approved June 20, 1906 (Act June 20, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]), and which is amendatory of the Interstate Commerce Act approved February 4, 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), that that Act, in so far as it attempts to hold

1. *Carrier of goods.* — See, at end of the case at bar, notes of some recent cases in several States, arising out of injuries to goods, etc., caused by alleged negligence of the carrier.

Carrier of live stock. — See, also, the preceding case reported herein, and the notes of cases appended thereto, for actions arising out of injuries to live stock caused by alleged negligence of the carrier.

liable the initial carrier for the negligence of a connecting carrier, is unconstitutional and invalid, and, if valid, that the State courts have no jurisdiction to enforce the rights thereby created. The defendant further denied every allegation of negligence and damage, and specifically pleaded that according to the written contract of shipment it was provided that a notice in writing of the claim for loss or damage must be given within thirty hours after the arrival of the property at destination and delivery, and that, if such notice was not given, a recovery could not be had, and it alleged that such notice was not given.

By the contract under which these peaches were shipped, it was provided: "No carrier shall be responsible for loss or damage of any of the freight shipped unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination. No carrier shall be responsible for loss or damage to property unless notice of such loss or damage is given to the delivering carrier within thirty hours after delivery." Relying upon the validity of the above stipulations, the defendant asked the giving of the following instructions: "7. I charge you that by the terms of the contract, if the shipper claimed that there was damage or loss sustained, it was his duty to give notice of the same within thirty hours after the arrival of the same at destination. If he failed to do so, then he could not recover in this action. 8. I charge you that no recovery could be had in this case unless notice of said loss or damage was given to the delivering carrier within thirty hours after delivery." The court refused to give these instructions.

The evidence tended to prove that the peaches were delivered to the defendant for transportation on July 20, 1907, consigned to "D. T. Goldsmith, Pier 29, New York, care of Vandalia," and that they arrived on the docks in New York, Pier 29, at twelve o'clock on July 28, 1907, and on the same day were delivered to D. T. Goldsmith, who began an examination of the same on the night of that day by opening the crates and baskets and inspecting the peaches, and he testified that he then found them in a very unsound and decayed condition. On the morning of July 29, 1907, D. T. Goldsmith, the party named as consignee in the bill of lading, executed a written receipt for the peaches, in which he stated, "Received in good condition the following described packages," and then follows a description of this shipment of peaches. Thereafter, and on the 29th day July, 1907, the peaches were sold by plaintiff's agent at a very greatly reduced price on account, as it is claimed, of their damaged con-

dition. It does not appear that any notice of any kind was given at any time of the intention to claim damages or of any claim of damages.

Inasmuch as the right of plaintiff to recover herein is determined by the failure to give the notice of the claim of damages as required by the stipulations of the contract of shipment, we do not think it necessary to enter into a discussion and determination of the other defenses interposed by defendant. The contract of shipment in this case specifically provided that, before a recovery could be had, a notice in writing must be given of loss or damage within thirty hours after the arrival of the peaches at destination and their delivery; that is to say, a notice of the intention to claim damages must be so given. And in this case such notice was not given. This provision of the contract does not affect the liability, itself, of the common carrier created or caused by the act itself of injury or of negligence. It is not a limitation of or an exemption from liability done or caused by such act of injury or negligence. Therefore this provision does not itself limit the common-law liability of the carrier, nor does it exempt the carrier from the performance of any common-law duty or from the common-law liability imposed upon it by any failure or negligence in the performance of those duties. It is a regulation which the parties have agreed shall be a condition to a recovery. It is founded upon the consideration of the original contract, and its validity depends upon its reasonableness. If it is not inhibited by any statutory enactment, and if it is otherwise reasonable, there is no reason of public policy that should declare it invalid.

Mr. Hutchinson, in his work on Carriers [3d ed.] § 442), says: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after loss has occurred; and, when such conditions are reasonable, the owner will be precluded from the right to maintain an action against the carrier, unless he has presented the notice within the time stated and in the manner provided. The object of conditions of this character, it is said, is to enable the carrier, while the occurrence is recent, to better inform himself of what the actual facts occasioning the loss or injury were, and thus protect himself against claims which might be made upon him after such a lapse of time as to frequently make

it difficult, if not impossible, for him to ascertain the truth. It is just therefore that the owner, when the loss or injury has occurred, should be required, as a condition precedent to enforcing the carrier's liability, to give notice of his claim according to the reasonable conditions of the contract." And thus it will be seen that this provision is a condition of recovery, and not an exemption from liability. Its effect is to require the one who has the peculiar knowledge to inform the other who has not that knowledge to seek the facts while they exist, so that the facts may be obtained and presented by both sides. Its effect is therefore to uphold and enforce rights if they are founded on truth, and not to limit or defeat those rights. 6 Cyc. 505; *Kalina v. Union Pac. R. Co.*, 69 Kan. 172, 76 Pac. 438, 17 Am. Neg. Rep. 666; *The Westminster*, 127 Fed. 680, 62 C. C. A. 406, 17 Am. Neg. Rep. 664.

This court has uniformly upheld and enforced similar provisions in contracts of common carriers where the same, under the circumstances of the case, were reasonable and the damages occurred during the actual transportation of the goods. *Kansas & Ark. V. R. Co. v. Ayres*, 63 Ark. 335, 1 Am. Neg. Rep. 3, 38 S. W. 515; *St. Louis & San F. Ry. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215; *St. Louis, I. M. & S. R. Co. v. Jacobs*, 70 Ark. 401, 68 S. W. 248; *St. Louis S. W. Ry. Co. v. McNeil*, 79 Ark. 470, 96 S. W. 163; *St. Louis & San F. R. Co. v. Pearce*, 82 Ark. 353, 101 S. W. 760; *St. Louis, I. M. & S. R. Co. v. Furlow*, (Ark.) 117 S. W. 517. This court has also uniformly upheld and enforced similar provisions in the contracts of telegraph companies, requiring the giving of notice of claim of damages within the stipulated time as a condition precedent to a recovery. And it is said in the case of *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S. W. 468, that the authorities are almost uniform in maintaining the reasonableness and validity of such stipulations. *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112.

Under the circumstances of this case we think this provision for notice was reasonable. The shipper delivers for carriage perishable goods which are packed in baskets and crates so that any damage to them was not discoverable until they were unpacked. The carrier has an innumerable amount of shipments so that it would be impracticable, if not impossible, for the carrier to examine each shipment to discover whether injury or damage had been sustained by it. And neither the contract, nor usage, nor reason demands of the carrier such inspection, even if he had the right to break packages for such examination. In this case, after the arrival and delivery of the

goods at New York, the party named as consignee, and who received the peaches, gave to the carrier a written receipt, in which he stated that the peaches were then in good condition. This was *prima facie* evidence of this fact or that condition of the peaches. 6 Cyc. 505. And while that could be controverted or explained by testimony, it nevertheless shows the reasonableness of the provision requiring the giving of the notice of claim of damage within the time specified. For here, in the first place the carrier had no opportunity to examine the condition of the peaches and then the shipper gives him a written statement saying that they are in good condition, and thus lulls the carrier into inaction, if he had the opportunity of inspection. But within a few hours after the delivery the consignee unpacked the peaches and discovered their alleged damaged condition, and within the thirty hours after such delivery actually sold and entirely removed the peaches. A notice could readily and conveniently have been given to the party designated to receive the same within the time specified in this provision of the contract of this claim of damage, and an opportunity would thus have been afforded to the carrier to also have examined the peaches and found out the amount of the damages. The shipper had agreed to this provision, and the written evidence of the agreement was continuously in his possession to the time of the delivery of the peaches to him at the point of destination.

Under all the circumstances of this case, this stipulation of the contract was reasonable, and, under the repeated decisions of this court, it was valid and binding; and in this case therefore it must be upheld, if it is not invalidated by the provisions of the Act of Congress, known as the "Hepburn Act," above referred to, making the initial carrier liable for damages to property received by it for transportation caused by any connecting carrier, and providing that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." In the case of *St. Louis, I. M. & S. Ry. Co. v. Furlow* (decided by this court on March 1, 1909) 117 S. W. 517, we held that a stipulation in a contract of shipment, requiring a notice of damage to be given similar to the one involved in this suit, was not invalidated by any provision of the Hepburn Act. In that case we said: "The stipulation in question does not exempt the defendant from liability imposed by that Act which extended the liability of the initial carrier for loss, damage, or injury to property while in course of transportation over the line of a connecting carrier. Before it was enacted, an initial carrier could not exempt itself from such liability for loss, damage, or injury incurred on its own line, yet it was

lawful for it to enter into stipulations like the one in question when the shipment of property was confined to its own line. For the same reason it can enter into such stipulations under the Hepburn Act as to loss, damage, or injury suffered on the line of a connecting carrier."

It therefore follows that the stipulation in the contract of shipment in this case, requiring a notice to be given of the claim of damages within the time therein specified, is reasonable and valid; and upon the failure to give that notice the plaintiff was not entitled to recover. The court therefore erred in refusing to give the said instructions Nos. 7 and 8, asked for by the defendant. The evidence tended to show that the above notice was not given, and it seems in the testimony to be conceded that such notice was not given.

It would not therefore serve the ends of justice to remand this cause for a new trial.

The judgment of the lower court is therefore reversed, and the cause dismissed.

NOTES OF CASES ARISING OUT OF DAMAGES TO GOODS WHILE BEING TRANSPORTED BY CARRIER.

In connection with *ST. LOUIS & SAN FRANCISCO R. R. CO. v. KELLER* (Ark.) 119 S. W. 254, the preceding case reported in this volume of *AM. NEG. REP.*, see the following cases:

Loss of package of electric fixtures — Conversion — Carrier liable.

In *CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. ALBERT PFEIFER & BRO.* (Arkansas, May, 1909) 119 S. W. 642, judgment for plaintiff in the Circuit Court, Pulaski county, was *affirmed*, the case being stated in the opinion by FRAUENTHAL, J., as follows:

"The plaintiffs, Albert Pfeifer & Bro., instituted this suit against the defendant, the Chicago, Rock Island & Pacific Railway Company, and in their complaint alleged: That on or about October 1, 1907, they purchased from Edward Miller & Co. two packages of electric fixtures for electroliers and delivered same to the New York, New Haven & Hartford Railroad at Meriden, Conn., to be carried over its own and connecting lines of railroad to Little Rock, Ark., and there to be delivered to plaintiffs; that the two packages of fixtures were delivered to and received by the defendant as the connecting carrier; that the defendant lost one of the packages and failed to deliver same to plaintiff; that this package contained a part of the electric fixtures and was of the value of \$67.43, for which sum they sought judgment against defendant in the court of a justice of the peace, and the defendant took the cause by appeal to the Circuit Court, and in that court a trial was had before a jury, who returned a verdict for \$67.43 in favor of the plaintiffs, and from the judgment entered on said verdict the defendant appeals to this court." * * *

"The jury, by their verdict, found that the goods were delivered to the

defendant, and it is contended that there is not sufficient evidence to sustain that finding. The evidence tended to prove that the entire shipment of electric fixtures were packed in two packages, one a barrel, and the other a box, and that these two packages were entered by the initial carrier upon one waybill and were also entered on one expense bill. They were shipped from Meriden, Conn., on the same day in October, 1907, and were transported to Memphis, Tenn., at which point the defendant is a carrier connecting with the lines of carriers from points in Connecticut, and the defendant is a carrier over its own line of railroad from Memphis, Tenn., to Little Rock, Ark. On October 15, 1907, the defendant presented to the plaintiffs its expense bill for the freight for the carriage of these two packages of goods from Meriden, Conn., to Little Rock, Ark., and on this bill were the two packages, the barrel and the box, and the plaintiff paid to the defendant the charges for the transportation of the barrel of fixtures and the box of fixtures, and received from the defendant the receipted expense bill upon which were the two items. Thereupon, on that day, the defendant delivered to the plaintiffs the barrel of fixtures, but did not deliver the box of fixtures. An employee of the Merchants' Transfer Company, in conjunction with one of the clerks of defendant, made search for this box at the freight depot of defendant, but failed to find it. This employee had had an experience of several years in the handling and delivery of goods at and from the depot of defendant to its patrons in the city of Little Rock. He testified that he saw the waybill of defendant for these goods, and that the two packages appeared thereon, and that around both items were certain check marks or circles which, according to the conduct of the business at defendant's office, indicated that both the packages, barrel and box, had been received at Little Rock, Ark., by defendant.

"Upon the part of the defendant, the evidence tended to show that about thirty days after the defendant had delivered to plaintiffs the barrel of fixtures, another railroad company operating in Little Rock, Ark., the St. Louis, Iron Mountain & Southern Railroad Company, claimed to have at its freight room a box directed to plaintiffs and presumably the box of fixtures involved in this case, and offered same to plaintiffs, which they refused to accept; but there is no testimony indicating when or from whom this latter company received the box of goods. There is no testimony tending to show that this latter company received this box of goods at Memphis, Tenn., or from some carrier entering Memphis from the east and a connection of the initial carrier. So far as the testimony in this case appears, it may be that the St. Louis, Iron Mountain & Southern Railway Company received this box of goods from the defendant, through mistake or otherwise, at Memphis, Tenn., or at Little Rock, Ark., after its shipment over defendant's line of railroad. However that may be, the evidence is sufficient to justify the jury in finding that this box of fixtures, was actually delivered to and received by the defendant at Memphis, Tenn.; and the fact that thirty days later it was found in the possession of the other railroad company does not disprove this conclusion." * * *

"In the case at bar the two packages, barrel and box, were transported at the same time in one shipment. The defendant admits it received and

transported the barrel of goods. Upon its waybill and expense bill appeared both the barrel and box of goods with notations thereon indicating that both barrel and box were received by it and carried by it to Little Rock and checked as in their possession at Little Rock. The question as to whether the defendant did receive the box of goods was a question of fact peculiarly within the province of the jury to determine. They have found that the defendant did receive same, and we cannot say that there is not sufficient evidence to sustain that finding. Having thus received this box of fixtures for carriage, the defendant became responsible not only for their safe carriage against all accidents except the act of God or the public enemy, but also became responsible for their delivery to the proper person. The duty imposed by law upon the carrier to deliver the goods to the proper party is absolute, and nothing will excuse a delivery to any other party; and if a misdelivery of the goods is made by the carrier growing out of mistake, or fraud, or imposition on it, this will not relieve the carrier from liability. 2 Hutchinson on Carriers (3d ed.) § 662; 6 Cyc. 472; *Little Rock, M. R. & Tex. Ry. Co. v. Glidewell*, 39 Ark. 487. So that, after defendant received the goods, the fact that they were turned over to another railroad company, either through mistake or otherwise, would not relieve the defendant from making a delivery or an offer of a delivery of the goods to plaintiffs, either by the defendant company or the other company acting for it." * * *

"Even if there had been charges unpaid by plaintiffs on the goods, the defendant could not dispose of same without some statutory authority or under a judicial order or legal process; and an unauthorized disposition of the goods by defendant would amount to a conversion. 2 Hutchinson on Carriers (3d. ed.) § 889. But in this case the undisputed evidence showed that the plaintiffs had paid to defendant all freight charges, and that therefore there were no charges due thereon so far as the plaintiffs were concerned.

"In this case the evidence on the part of the defendant itself shows that after the plaintiffs refused to take the goods, the St. Louis, Iron Mountain & Southern Railroad Company disposed of them. Now this latter company in tendering the goods to the plaintiffs was only acting for and on behalf of the defendant. If it was not, the plaintiffs were in no relation with them in the matter of these goods, and were under no duty to accept the goods from them or to treat with them. The defendant had received the goods, and, if by mistake or otherwise it delivered them to the St. Louis, Iron Mountain & Southern Railroad Company, it did not deliver them to the proper person, and so became liable for the value of the goods. If, acting for or in behalf of or as agent of the defendant, the St. Louis, Iron Mountain & Southern Railroad Company tendered these goods to plaintiffs, the tender should, like all tenders, have been kept good to the time of the trial, and the box of electric fixtures should have been offered to plaintiffs at the trial. *Hamlett v. Tallman*, 30 Ark. 505; *Schearff v. Dodge*, 33 Ark. 340; *Cole v. Moore*, 34 Ark. 589; *Bloom v. McGehee*, 38 Ark. 329; *Kelly v. Keith*, 85 Ark. 30, 106 S. W. 1173. The disposal of these goods by the defendant or its agent was a conversion of them by it, and on account of that conversion the defendant is liable to plaintiffs for the value of these goods." * * *

Delay in delivery of log wagons — Measure of damages — Erroneous instruction.

IN CHICAGO, ROCK ISLAND & PACIFIC RY. CO. *v.* NEWHOUSE MILL & LUMBER Co., (*Arkansas*, May, 1909) 119 S. W. 646, appeal from judgment for plaintiff in the Circuit Court, Pulaski county, in an action for damages for alleged negligent delay in delivering a car load of log wagons, judgment was *reversed*, the opinion by BATTLE, J., stating the case as follows:

"The evidence showed that the log wagons were loaded on the defendant's train on the 3d day of September, 1907, at Pinnacle, Ark., and delivered at Gould, in this State, on the 27th day of September, 1907. There was no evidence that plaintiff received any damage from the failure to deliver promptly, except special damages; and the complaint and evidence fail to show that plaintiff at any time before delivery had notice that such damage would accrue from such failure.

"The court instructed the jury, over the objection of the defendant, as follows.

"The measure of damages in this case is the usable value of these goods while they were delayed by the railroad company."

"The jury returned the following verdict: 'We, the jury, find for plaintiff verdict in the sum of \$400, amount of loss on contract for delay in delivery of shipment, after allowing for reasonable time for shipment, moving from the Pinnacle, on the Rock Island, to Gould, on the Iron Mountain Railroad, a distance of ninety-two miles.'

"Judgment was rendered accordingly. Defendant appealed.

"The instruction and verdict were contrary to the law. The measure of damages in this case was the difference in value of the wagons, if they had depreciated during the delay, at the time when they should have been delivered and at the time they were delivered, after deducting the unpaid cost of transportation, unless appellant had notice that special damages or more than ordinary damages would result from the failure to deliver in time. No notice was given or received in this case and special damages were not recoverable. *Railway Co. v. Mudford*, 48 Ark. 508, 3 S. W. 814; *Murrell v. Express Co.*, 54 Ark. 24, 14 S. W. 1098; *Hooks Smelting Co. v. Planters' Compress Co.*, 72 Ark. 287, 79 S. W. 1052; *Crutcher v. C. O. & G. R. R. Co.*, 74 Ark. 358, 85 S. W. 770; *Pine Bluff Iron Works v. Boling*, 75 Ark. 469, 88 S. W. 306; *Long v. Abeles & Co.*, 77 Ark. 150, 91 S. W. 29."

Loss of cotton — Carrier liable.

IN CENTRAL OF GEORGIA RAILWAY CO. *v.* MANCHESTER MANUFACTURING CO., (*Georgia Appeals*, June, 1909) 64 S. E. 1128, action for damages for loss of eight bales of cotton shipped over defendant's line, judgment for plaintiff in the City Court of Macon was *affirmed* with damages for delay it being held that the writ of error was entirely without merit. The opinion was rendered by RUSSELL, J. The third paragraph of the syllabus by the court is as follows:

"There being evidence that the cotton which was the basis of the present suit was delivered to the carrier, and that said cotton was never delivered by the carrier to the consignee, it was not error to instruct the jury that a common carrier is bound to exercise extraordinary diligence,

and that in case of loss the presumption of law is against a common carrier, and no excuse avails the common carrier, unless it is occasioned by the act of God or the public enemies of the State."

Failure to deliver load of cross ties — Contract — Liability of carrier.

In ATLANTA, BIRMINGHAM & ATLANTIC R. R. Co. v. N. EMANUEL & Co., (*Georgia Appeals*, June, 1909) 64 S. E. 1098, action for damages to recover value of one car load of cross ties, judgment for plaintiff in the City Court of Brunswick was *affirmed*. The opinion was rendered by HILL, CH. J., who stated the case as follows:

"From the agreed statement of the facts the following appears: The defendant received the car of ties referred to in the plaintiff's declaration at Thalman, Ga., on or about April 16, 1907, for transportation and delivery to the plaintiffs at Brunswick, Ga., and transported the car to Brunswick, Ga., and on April 23, 1907, delivered it to the Atlantic Coast Line Railroad Company, with instructions to deliver it to the plaintiffs at their docks in Brunswick. The shipment originated at Bladen, in Glynn county, which is a competitive point as to Brunswick, since shipments originating there can be transported and delivered to Brunswick either over the Atlantic Coast Line or over the line of the Seaboard Air Line to Thalman, and thence from Thalman to Brunswick over the line of the defendant. The plaintiffs have sidetrack connections on their docks in Brunswick with the Atlantic Coast Line, and none with the line of defendant, and under instructions of the plaintiffs to defendant, unless otherwise ordered, shipments of cross ties in car load lots, consigned to plaintiffs and transported by the defendant, are delivered to the plaintiffs on such side tracks, and such delivery is made under the following arrangement: The car is delivered by the defendant to the Atlantic Coast Line, with instructions to be side-switched or transferred from the tracks of the defendant to the docks of the plaintiffs. The freight on the car is collected from plaintiffs by the defendant. Whether the shipment originates at a competitive or noncompetitive point, there is a charge made by the Atlantic Coast Line for the switching service, and this is charged against and paid by the defendant to the Atlantic Coast Line Railroad Company. The car in question was handled in this manner, but was never delivered to plaintiffs. They paid the defendant the freight due on said car, \$14.10; and this was the full amount due thereon by the plaintiffs for delivery on the side tracks on the docks of the plaintiffs. The car was loaded with 259 cross ties, of the value of fifty-eight cents each. Certain rules of the Railroad Commission are attached to this agreed statement as a part thereof; but this court does not consider them material to the decision of the questions. If so, they will be judicially recognized.

"The suit is one arising on contract, and not in tort, as contended by the defendant in error. If in tort, the judgment would have to be reversed, as this remedy is against the actual wrongdoer; and according to the agreed facts, the car load of cross ties was lost by the Atlantic Coast Line Railroad Company after having been delivered to it by the defendant. The present action is for a breach of the contract made by the defendant with the plaintiffs to transport the car load of cross ties

from the point of shipment and 'deliver it to the plaintiffs at their docks in the city of Brunswick.' Treating the action as one *ex contractu*, the defendant sets up two defenses: First, it contends that under the facts the Atlantic Coast Line Railroad Company was the agent of the plaintiffs, acting under direct authority to receive and handle the shipment at Brunswick, and that when the delivery was made by the defendant to the Coast Line at Brunswick the contract was fully performed, and it was released from any further responsibility. Second, if the Coast Line was not the agent of the plaintiffs, it was a common carrier required by law to receive the car load of cross ties from the defendant as a connecting carrier and to carry it to the plaintiffs' docks, receiving therefor the compensation fixed by law, and in no view was the Coast Line the agent of the defendant. Either defense would be sufficient in law, if authorized by the facts. We think neither conclusion is supported by the evidence. The contract made by the defendant with the plaintiffs was to transport the car of ties to Brunswick, and there deliver it to the Atlantic Coast Line Railroad, with instructions that it be switched or transferred to the docks of the plaintiffs; and it is agreed that the car was transported by the defendant to Brunswick and there delivered by it to the Atlantic Coast Line Railroad, 'with instructions to deliver it to the plaintiffs at their docks in the city of Brunswick.' The instructions to deliver were given by the defendant to the Coast Line Railroad, for it had undertaken, not only to transport the ties to Brunswick, but to deliver them to the plaintiffs at their docks. The freight from point of shipment to point of delivery was paid to the defendant by the plaintiffs, and the defendant paid the Atlantic Coast Line Railroad its charges for hauling the freight from its tracks to the docks of the plaintiffs. The plaintiffs had no contractual relations whatever with the Atlantic Coast Line. Their contract was solely with the defendant, and the latter employed the Atlantic Coast Line in order to complete its contract with plaintiffs to deliver 'on their docks.' The contract to deliver the ties to the plaintiffs 'on their docks' was as plainly the duty of the defendant as the contract to transport from the receiving point to Brunswick.

"That the foregoing conclusion is correct is further emphasized by the fact that the shipment was made from a competitive point. It might have been transported by the Atlantic Coast Line and delivered to the plaintiffs on their docks at Brunswick, without any transfer or switching service at Brunswick. In order to successfully compete with the Atlantic Coast Line, the defendant would necessarily have been compelled to transport and deliver to the plaintiffs without imposing upon them the burden of transferring the car from its tracks to their side tracks on their docks. This is the reason why the defendant charged and collected the full amount of the freight from the point of shipment to the place of delivery on the side tracks on the plaintiffs' docks. The Atlantic Coast Line, under the facts, was neither the agent of the plaintiffs, nor was it a connecting carrier. It was simply performing a switching or transfer service for the defendant, acting under instructions given to it by the defendant and paid for such service by the defendant. *W. & A. R. Co. v. Exposition Mills*, 81 Ga. 522, 7 S. E. 916; *Dixon v. Central of Ga. Ry. Co.*, 110 Ga. 173, 35 S. E. 369. The evidence demanded the finding of the court. Judgment affirmed."

Household goods and personal effects lost in transit — Connecting carriers — Liability.

IN *WAY v. SOUTHERN RAILWAY CO.*, (*Georgia Supreme*, June, 1909) 64 S. E. 1066, judgment for defendant in the Superior Court, Chatham county, was *reversed*, the facts being stated in opinion by LUMPKIN, J., as follows:

"Way brought suit against the Southern Railway Company for the loss of certain personal property. The evidence for the plaintiff showed the following facts: Through an agent he caused certain household furniture and personal chattels to be shipped from Watertown, N. Y., to Savannah, Ga., consigned to himself. The initial carrier was the New York Central & Hudson River Railroad Company. The final carrier in the line of transportation was the defendant. The first-mentioned company issued a bill of lading acknowledging the receipt of the goods, of which an itemized statement was given, consisting of two bed ends, two bed rails, one washstand, one dresser, and other named articles. The weight was given, in bulk, as 1,625 pounds. The plaintiff was named as the consignee, and the place of destination as Savannah, Ga. It stated that the initial carrier had received the property in apparent good order, 'consigned and destined as indicated below, which said company agrees to carry to said destination if on its road, otherwise to deliver to another carrier on the route to said destination.' One of the conditions printed on the back of the bill of lading was that no carrier should be liable for loss or damage not occurring on its own road, or its portion of the through route. At Savannah some of the articles included in the shipment were delivered to the consignee, but others were not. On application by the plaintiff to the delivery clerk of the defendant at Savannah, the latter told him that the goods had been lost in transit, that they would probably turn up, and, if not, that the plaintiff should file his claim with the defendant. The plaintiff then saw the claim clerk, who said he would investigate the matter. The lost goods were never received by the plaintiff. Evidence was introduced as to their value, and that the articles shipped were in good condition when delivered to the first carrier. Among the articles for the loss of which suit was brought was certain wearing apparel, which the plaintiff claimed was packed in the dresser and washstand which were lost. The defendant introduced its agent as a witness, who testified that as between household goods, such as furniture, and such goods as clothes, the higher freight rate was on clothing, and that 'freight from Watertown, N. Y., is subject to the southern classification.' It also introduced a decision reported in 51 N. Y. 166, 10 Am. Rep. 575 (*Belger v. Dinsmore*) on the subject of limiting the common-law liability of a carrier, and the valuation of the property shipped, by stipulations in a receipt given by the carrier for the freight. Upon the close of the evidence, the presiding judge directed a verdict for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted." * * *

The points decided are stated in the syllabus by the court as follows:

"1. Where several articles of household furniture, included in a single shipment and covered by one bill of lading, which mentioned them in detail, were delivered in good order to the first of a connecting line of common carriers, for transportation over the entire line, and where the

last of the connecting carriers delivered some of the articles to the consignee, but not all of them, in a suit by the consignee against the final carrier, based on its common-law liability, upon proof of such facts and of the value of the articles lost, he made out a *prima facie* case, and shifted the onus to the defendant to show that it did not receive the lost articles, or otherwise was not liable for the loss; and it was error to direct a verdict for the defendant.

"2. If in such a case the plaintiff was not entitled to recover for articles of clothing claimed to have been packed in a washstand and dresser which formed a part of the shipment and were lost, this would not authorize the direction by the court of a verdict for the defendant, denying any right to recover for the lost furniture." (ATKINSON, J., *dissented*).

Stone damaged — Carrier liable — Damages.

In LOUISVILLE & NASHVILLE R. R. CO. ET AL. *v.* VENABLE, (*Georgia Supreme*, April, 1909) 64 S. E. 466, judgment for plaintiff in the Supreme Court, DeKalb county, was *affirmed*. The syllabus by the court states the case (a mem. of affirmance being rendered by ATKINSON, J.) as follows:

"1. Under the evidence in this case it could not be held as matter of law that the shippers of the stone which was damaged were limited in their recovery to an amount stated in the bills of lading, if such damage resulted from negligence on the part of the carrier; and it being admitted on the trial that there was no issue in the case, as presented by the evidence, except the construction of the bills of lading introduced, there was no error in directing a verdict for the plaintiff for the amount admitted by the defendant to be due, if the court's construction of the bill of lading was correct. On the general subject, see *Georgia So. & Fla. Ry. Co. v. Johnson*, 121 Ga. 231, 48 S. E. 807; *Central of Ga. Ry. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, and cases cited.

"(a) There was no exception or contention that the court should have submitted to the jury as a question of fact whether there was a *bona fide* effort to value the stone shipped and express such value in the bill of lading.

"2. The more especially did the court not err 'in not holding that the plaintiffs were limited in recovery of damages to the value of the stone as set out in the bills of lading received by the plaintiffs from the defendants' when the evidence showed that some of the bills of lading expressed a value of twenty cents per cubic foot, and others forty cents per cubic foot, which the parol testimony stated was an erroneous entry, and should have been twenty cents, and some of them expressed no valuation at all."

Liability for loss or damage to goods.

In SOUTHERN EXPRESS CO. *v.* BAILEY, (*Georgia Appeals*, January, 1910) 66 S. E. 960, judgment for plaintiff in the Superior Court, McIntosh county, was *affirmed*, the syllabus by the court (a mem. of affirmance being rendered by POWELL, J.) stating the case as follows:

"1. In an action against a common carrier for a failure safely to transport and deliver goods committed to it by a shipper, specific allegations of negligence may be treated as surplusage. The action does not depend

upon negligence. *Louisville & Nashville R. Co. v. Warfield*, 129 Ga. 473, 59 S. E. 234.

"2. While a common carrier may defend against an action in which it is sued for a loss or damage to goods by showing that the loss or damage accrued through an inherent vice or natural deterioration of the object carried, the burden of establishing this defense is upon the carrier.

"3. This court is unable to say that the verdict is without evidence to support it."

Loss of cases of eggs from car — Right of action — Parties — Carrier liable.

In *EDGERTON v. CHICAGO, ROCK ISLAND & PACIFIC RY. CO.* (*Illinois Supreme*, June, 1905) 88 N. E. 808, judgment for plaintiff in the Appellate Court, First District, affirming judgment in Municipal Court of Chicago, for \$275, was affirmed. The opinion was rendered by CARTER, J., and the facts were stated as follows:

"On April 21, 1904, H. Fishback shipped from Beatrice, Neb., to appellee, who was doing a commission business on South Water street, in Chicago, a car of eggs via appellant's railway. The evidence discloses that this car reached Chicago and was placed in the yards of appellant in the usual and customary place for the delivery of car load shipments of eggs on a team track at Twelfth and Taylor streets. Just when appellee received notice is not clear, but on April 25th he gave an order, through one of his salesmen, to the appellant company to allow an inspection of the car by said salesman and a representative of Mr. Roberts. These two men — Scheele, representing appellee, and Ennis, representing Roberts — went to the yardmaster of appellant with the order from appellee, and, on the seals of the car being broken, the two men in question inspected the eggs, consuming from one to two hours in the work, but did not remove any of them. They did not count the cases or notice that any of them were missing. They told the yardmaster after they were through that they wanted the car sealed again, but did not tell him whether they intended to unload the car or reroute it. Roberts purchased the eggs from Edgerton the same day, and an order was given by both parties to the appellant company to reroute the car over the Wabash railroad and Hoosac Tunnel Line to Albany, N. Y. The car was delivered the next day, April 26th, to the Wabash Railroad Company by appellant. It is stipulated that the car was resealed by the appellant company before delivering to the Wabash Company, and that these seals were intact and unbroken at the time it was received in Albany, N. Y. When the car seals were broken in the latter city and the eggs examined, it was found that fifty-three cases were missing. The evidence is uncontroverted that the car contained these fifty-three cases when it was loaded and shipped over appellant's road from Beatrice, Neb. From the evidence in the record the conclusion is inevitable that these fifty-three cases of eggs were in some way taken from the car between the time it was taken possession of by the appellant company in Beatrice, Neb., and the time of its delivery, sealed to the Wabash Company, in Chicago, on April 26th.

"The only serious question in this case is whether appellee was the

proper party to bring this action. It is contended by appellant that Roberts was the owner after the sale to him of the car load of eggs and also at the time the order was received by the appellant company to deliver the car to the Wabash Railroad Company, and that under the rule of law that, where a person has no property or interest in the goods, he cannot sue in an action *ex delicto* for a breach of duty by the carrier (3 Hutchinson on Carriers [3d ed.], § 1314), the appellee could not bring this action. The decisions in the various jurisdictions on this question cannot be harmonized, and the distinctions between the rights of parties when the action is in assumpsit and when in tort are not always clearly defined. This court in *Great Western R. Co. v. McComas* 33 Ill. 185, in an action on the case for negligence, stated (page 187): 'The company made the contract to carry and deliver with McComas, and there is no principle better settled than that the consignor, for a breach of the duty, be he but a bailee, may sue. He has such a special property in the goods as to give him the right of action. So may the real owner sue, and so may the consignee. The company cannot excuse themselves in a suit brought by the consignor for negligence that the real title was in his bailor, unless they show the property has been taken out of their possession by him without any injury or injustice to the lender or bailor.' This case reviewed at some length the English and American authorities on this question, and held that the railroad company was the agent of McComas, of whom it received the property, and was not at liberty to dispute his title in an action brought by him. The rule laid down in this decision was quoted with approval by this court in *Chicago & Alton Co. v. Shea*, 66 Ill. 471, and, while the latter case was an action in assumpsit, no modification was made of the former rule on that account. The case of *Great Western Ry. Co. v. McComas*, 33 Ill. 185, has never been overruled by this court, and it is understood in other jurisdictions to be the law of this State. 4 Elliott on Railroads (2d ed.) § 1413a; 6 Cyc. § 510, note 78; *Carter v. Southern R. Co.*, 111 Ga. 38, 36 S. E. 308.

"In Angell on Carriers (5th ed. § 493) that author quotes with approval from *White v. Bascom*, 28 Vt. 268, the statement that though the case of *Freeman v. Birsch*, 28 Eng. Com. L. R. 543, 'clearly establishes the right of the bailee to sue, yet this must not be understood necessarily to exclude the bailor from the exercise of a similar right—supposing, that is to say, he chooses to step in and anticipate the bailee in bringing an action—a conclusion which seems to be deducible from the general state and condition of property under bailment, which is, as it were, *in dubio* between the parties, and vested for some purposes in the bailee and for some purposes in the bailor. The right of property being thus floating and undetermined, it seems to follow that the right of action which arises from it must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself.' The author continues in the same section: 'It cannot be denied that the right of an agent or a bailee having a special property in the goods which are the subject-matter of the transaction to sue for any default of the carrier in respect to them while in the course of transportation is subservient to the right

of the principal to interfere and bring the action in exclusion of the agent's or bailee's right. The rule in such cases is stated by Parke, B., to be that either the bailor or the bailee in such cases may sue, and whichever first obtains damages it is a full satisfaction.' The case above referred to in which the rule was so stated is *Nicolls v. Bastard*, 2 Crom. M. & R. 659. See, also for further discussion of this subject, 2 Redfield on the Law of Railways (6th ed.) § 191; *Green v. Clark*, 13 Barb. (N. Y.) 57; *Elkins v. Boston & Maine Railroad Co.*, 19 N. H. 337; *Gosling v. Birnie*, 20 Eng. C. L. Rep. 153; Van Zile on Bailments and Carriers (2d ed.) c. 11. From the evidence it cannot be ascertained when said fifty-three cases of eggs were taken out of the car. In the present state of the record it is very reasonable to suppose that they were removed before the sale by Edgerton to Roberts. The reasoning therefore, in the case of *White v. Bascom*, 28 Vt. 268, applies with great force to the facts in this case.

"Appellant contends that appellee had no such special interest as to entitle him to bring this action on the ground that appellee himself testified that the goods were shipped to him to sell on commission. Fishback, however, testified that he had sold them to Edgerton. Even assuming that they were shipped to appellee to be sold on commission, he plainly had such an interest, under *Great Western R. Co. v. McComas*, 38 Ill. 185, and the authorities heretofore cited, that he could rightly recover in an action of tort against the appellant." * * *

Delay in delivery of machinery — Damages — Erroneous instruction.

IN *AULTMAN ENGINE THRESHER CO. v. CHICAGO, ROCK ISLAND & PACIFIC RY. CO.*, (*Iowa*, May, 1909) 121 N. W. 22, judgment for plaintiff in the District Court, Linn county, was reversed for error on question of damages. The case is stated in the opinion by LADD, J., as follows:

"The petition alleged: That the Cedar Rapids Supply Company delivered to the defendant at Des Moines, Iowa, on June 11, 1903, a threshing machine feeder to be transported to Blackwell, Okl.; that defendant accepted the same and undertook its carriage as stated, receiving \$4.16 as compensation; that defendant failed to carry said feeder within a reasonable time and neglected to deliver the same at Blackwell; that the reasonable value of the feeder was \$220; that the date of delivery to defendant was prior to the commencement of the threshing season; that plaintiff had bargained the feeder to a party residing near Blackwell, and, had it been carried there with reasonable dispatch, the purchaser would have received it in time to use in the threshing season of 1903, but, owing to unreasonable delay, the feeder failed to reach its destination in time to be used, and the sale was lost, to plaintiff's damage in the sum of \$220. Judgment was prayed for that sum, with freight charges added. The defense was a general denial. It appeared from the evidence that the feeder was shipped from Des Moines June 11, 1903, that it was carried by way of Kansas City, Mo., at which point it was transferred on July 5th to the St. Louis & San Francisco Railroad Company, whose line passes through Blackwell, Okl., and was received for by the latter company two days later. It did not arrive at Blackwell until July 27, 1903. Taylor, to whom it was contracted, repeatedly called for it between June

18th and July 25th, departing on the latter date, and it arrived two days later. The testimony indicated that Taylor had executed notes amounting to \$165 for the feeder, and also was to turn in an old one at fifty-five dollars. On this showing, together with evidence that a reasonable time for transportation of the goods was four or five days, the court directed the jury that, if a verdict were returned for plaintiff, the sum of \$220, with interest, should be awarded as damages.

"For all that appears, defendant had not failed or refused to deliver the property on demand, nor had it appropriated the feeder to its own use or to that of others. The record leaves it at the place to which it was to be carried, subject to the order of the consignee. Possibly, delay in transportation might be so long as to warrant the inference of a conversion; but, if so, this is not such a case. All that can be said from the evidence is that the jury might have found the time for transportation to have been unreasonable, and allowed nominal damages therefor, as no actual damages were proven. *Clark v. American Exp. Co.*, 130 Iowa, 254, 106 N. W. 642, and cases cited therein." * * *

Damage to tomatoes caused by failure of carrier to keep refrigerator car in proper condition — Damages.

In *PENNSYLVANIA R. R. CO. v. OREM FRUIT & PRODUCE COMPANY OF BALTIMORE CITY*, (*Maryland Appeals*, June, 1909) 73 Atl. 572, judgment for plaintiff for \$449.50 in the Superior Court of Baltimore city, was *affirmed*. The opinion was rendered by BRISCOE, J., in the course of which the facts were stated as follows:

"The action was originally instituted in the Baltimore City Court, but the case was subsequently removed to the Superior Court of Baltimore city. The trial resulted in a verdict and judgment in favor of the Northern Central Railroad, one of the defendants, and a judgment in favor of the plaintiff against the Pennsylvania Railroad Company, the appellant corporation, also one of the defendants, for the sum of \$449.50. And from the last-mentioned judgment the defendant has appealed.

"The declaration alleged that on the 19th day of July, 1904, the defendants were common carriers of goods, for hire from Baltimore to divers places in the United States and Canada; that on said date, at Baltimore, Md., the plaintiff delivered to the Northern Central Railway Company, a branch of the defendant, the Pennsylvania Railroad Company, divers goods of the plaintiff, to wit, 479 crates of tomatoes, to be carried in refrigerator cars from Baltimore to Montreal, Canada, and then to be delivered to J. R. Clogg & Co., by said defendants, at the same time agreeing with the plaintiff to re-ice said refrigerator car in which said tomatoes were shipped at Wilkesbarre, Pa., and Oneonta, N. Y., which the defendants negligently failed to do; also the defendants neglected their duty and did not safely carry said goods to the aforesaid place, and, by reason of said neglect to safely carry and re-ice said tomatoes as aforesaid, the said goods were wholly lost and destroyed, whereby the plaintiff suffered great loss and damages, to wit, the value of said tomatoes.

"The facts relied on by the appellee to sustain the action are these: The plaintiff had been a large shipper of fruit and produce from Balti-

more city, their place of business, to Montreal, Canada, in refrigerator cars belonging to the appellant. On the 19th of July, 1904, the appellee delivered to the appellants, as common carriers, in the city of Baltimore, 479 crates of tomatoes to be carried in one of their refrigerator cars from Baltimore city to the place of destination — Montreal, Canada. The route of the car was over several systems of railroads, to wit, from Baltimore to Sunbury, Pa., over the Northern Central Railroad; from Sunbury to Wilkesbarre over the Sunbury Division of the Philadelphia & Erie Railroad, operated by the Pennsylvania Railroad Company; from Wilkesbarre by the Delaware & Hudson Company to Rouse's Point, N. Y., and by the Grand Trunk Railroad from the last-named point to Montreal, Canada, the point of destination. The tomatoes were received by the Northern Central Railroad Company at Baltimore in good condition, and were placed in a car for transportation under the terms of a bill of lading set out in the record. The car was inspected and properly iced in Baltimore before leaving the city at 5:40 P. M. on July 19, 1904. It arrived in Montreal on the 23d of July, 1904, in a heated condition, the ice tanks empty, and the tomatoes dead ripe.' The sum realized from the sale of the tomatoes amounted to \$37.59, whereas, if they had not been injured and damaged, the plaintiff would have received a larger sum.

"According to the terms of the contract between the plaintiff and defendant, stated in the bill of lading, the car was to be re-iced at two points, viz., at Wilkesbarre, Pa., on the line of appellant, a distance of about 213 miles from Baltimore, and at Oneonta, N. Y., on the line of the Delaware & Hudson Railroad, a connecting carrier, 167 miles from Wilkesbarre, the distance from Oneonta to Montreal being about 215 miles, making the entire route of the car 600 miles.

"It further appears that one of the defendant's lines ended at Sunbury, Pa., and the other at Wilkesbarre, Pa., but they had a through billing arrangement with the Delaware & Hudson Railroad. The re-icing of cars is noted on the card waybill which goes with the car and is delivered to the connecting carrier. The card shows the initials, the car number, its destination, routing, and the consignee. It is admitted that the car was not re-iced at either Wilkesbarre, Pa., or Oneonta, N. Y., according to the terms of the bill of lading.

"The witness Burroughs, assistant yardmaster of the Delaware & Hudson Railroad, testified that he inspected the car at Oneonta, N. Y., on July 20, 1904, and found the ice had melted about a foot from the top and he did not deem it necessary to re-ice it.

"There was evidence to show that the refrigerator car was delivered by the Pennsylvania Railroad Company at Wilkesbarre, and was received by the Delaware & Hudson Railroad Company in good order. The car was inspected, but not its contents. There was evidence also to the effect that the temperature in Baltimore, July 19, 1904, was highest ninety-seven degrees, lowest seventy-seven degrees; at Wilkesbarre, on July 20th, highest eighty-three degrees, lowest sixty-eight degrees; at Oneonta on July 21st, highest eighty-four degrees, lowest fifty-five degrees; at Montreal, July 22d, highest seventy-two degrees, lowest fifty-six degrees." * * *

"It is not disputed as we understand, that the appellant failed to

re-ice the car at Wilkesbarre, Pa., or at Oneonta, N. Y., according to the terms of the contract, as stated on the bill of lading, and this is the ground upon which the appellee rests its right to recover in this action."

* * *

" Failure to re-ice the car at the points named, according to the terms of the contract between the plaintiff and the defendant, are set out in the bill of lading, and it appearing from the evidence that injury and damage resulted from the neglect, would be such default on the part of the carrier as to render it liable for the damage caused thereby. *Orem Fruit Co. v. Northern Central Ry. Co.*, 106 Md., 1, 66 Atl. 436; *Meredith v. R. R. Co.*, 137 N. C. 479, 59 S. E. 1; *Myrick v. R. R. Co.*, 107 U. S. 107, 1 Sup. Ct. 425; *U. S. v. Denver R. R. Co.*, 101 U. S. 84, 24 Sup. Ct. 33." * * *

The other exceptions were reviewed and the court held there was no reversible error.

See former appeal between the same parties on practically the same facts, where the principles of law applicable to the facts of this case were settled. 106 Md. 1, 66 Atl. 436 (*OREM FRUIT, etc., Co. v. NORTHERN CENTRAL R. Co.*, et al).

Car load of peaches damaged — Connecting carriers — Damages.

In *PHILADELPHIA, BALTIMORE & WASHINGTON R. R. Co. v. DIFFENDAL*, (*Maryland Appeals*, January, 1909) 72 Atl. 193, judgment for plaintiff in the Circuit Court, Carroll county, was *affirmed*. The case was reviewed at length by WORTHINGTON, J., who, in the course of his opinion, stated the facts as follows:

" This suit was instituted by the appellee, George F. Diffendal, against the appellant, the Philadelphia, Baltimore & Washington Railroad Company, to recover damages for the injury which the plaintiff claims to have sustained by reason of the alleged negligence of the defendant in the transportation of a car load of peaches from Baltimore, Md., to Washington, in the District of Columbia. The plaintiff having obtained a verdict and judgment in the trial court for \$608, the defendant has brought this appeal to correct certain alleged errors in the rulings of that court.

" At the trial of the case in the lower court the defendant offered no evidence whatever in defense of the action, but relied upon what it contends was a failure of proof, on the part of the plaintiff, to sustain the action. The principal ground of this contention is that the burden is upon the plaintiff to show by direct testimony that the peaches were delivered to the defendant carrier in good condition. It is not disputed that, if this fact had been proven, and also that they had been delivered to the consignee at the end of the route in a damaged condition, a *prima facie* case would have been made out against the defendant; but it is insisted that, until proof of delivery to the defendant carrier in sound condition is affirmatively shown, the defendant is not called upon to offer evidence in its own defense. In support of this contention defendant cites the cases of *Marquette, etc., R. R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209; *Darling v. R. R. Co.*, 11 Allen (Mass.) 295, and some others. The important facts shown by the plaintiff's evidence are substantially as follows: The appellee is the owner of a peach orchard located near

Cavetown, in Washington county, Md., along the line of the Western Maryland Railroad. On Saturday, September 30, 1905, he caused to be picked and loaded on a refrigerator car standing on a siding of the said railroad at Cavetown, the car having been previously placed there for his use, 483 carriers and 126 baskets of peaches of the Salway variety. A carrier is a crate holding six small baskets of peaches. The car load of peaches was consigned to John A. Davis & Sons, commission merchants, Washington, D. C. No price had been agreed on for the peaches; but the price of \$1.50 net was guaranteed by Davis, over the telephone, for the carrier peaches, and more if the market would afford it. No price whatever was mentioned for the basket peaches, but the plaintiff testified that they would bring him seventy-five cents a basket. That the peaches were carefully picked and handled is shown by the evidence. The loading of the car was finished about six o'clock Saturday evening, September 30, 1905, and at that time the ice bunkers in the car were full of ice. The trapdoors on top of the car through which the ice was put into the bunkers were tight, and it was a first-class dairy refrigerator car. The carrier peaches were of first grade, highly colored, round, and perfect. The peaches in the baskets were just as good as those in the carriers, but not highly colored. The plaintiff received no bill of lading from the Western Maryland Railroad Company at the time the goods were shipped but a card waybill was tacked on the car. Subsequently, when plaintiff wanted to file his claim for damages, he obtained a bill of lading from the Western Maryland Railroad which he delivered back to that company when he filed his claim. The contents of neither the card waybill nor the bill of lading were introduced in evidence. Just at what hour the car left Cavetown over the Western Maryland Railroad does not appear, but it was shown by the witness Hugh Scott that the car was received at Fulton Station, Baltimore, on Sunday morning, October 1, 1905, at 6:30 o'clock, and delivered to the defendant at 8:30; the Western Maryland Railroad being the initial carrier from Cavetown to Baltimore, and the defendant the connecting and terminal one from Baltimore to Washington. Lishear, a witness for the plaintiff, testified that he lived in Washington, that he was in the express business and did hauling for Mr. Davis, the consignee, that Mr. Davis notified him on Saturday evening that he would have a car load of peaches coming in on Sunday, and for the witness to look out for them. Witness looked for them on Sunday and also on Monday. He looked for them half a dozen times. The peaches finally came in over the defendant's line on October 2, 1905, between five and six o'clock in the evening. Witness further testified that after he found them he and Davis looked at the peaches, and the top layer was pretty rotten, and there was no ice in the bunkers. Davis, the consignee, testified that he knew the peaches were coming in through a couple of telegrams he received. When he finally discovered that the peaches had arrived—that is, on Monday evening between five and six o'clock—he went over to the car, looked into the bunkers, and found no ice in them. He opened the car, and it was very hot. The peaches in the top row were very bad. Further down the peaches were better. He immediately ordered ice to be put into the bunkers. The next morning he started to sell the peaches and sold them to the best advantage. He

finished selling them on the 6th. He further testified that peaches would keep in a refrigerator car, if well iced, as long as ten days. After the peaches are in the car, if the ice goes, the effect is worse than if they had been out in the sun. He received \$511.76 gross for the fruit, and, after deducting freight and commissions, the net proceeds were \$373.63. That on Monday, October 2, 1905, peaches like plaintiff's sold in Washington at \$2.25 per carrier, and \$1 to \$1.50 per basket.

"We think there was evidence legally sufficient from which the jury could find that the peaches were placed in the car at Cavetown in good condition, that the car was a good refrigerator car, and that the ice bunkers were filled with ice on Saturday evening at six o'clock, when the loading of the peaches was completed. The finding of these facts was, under the circumstances, equivalent to explicit proof that the fruit was delivered to the initial carrier in sound condition. The ordinary common-law liability of a common carrier as to most commodities committed to its custody for transportation is that of an insurer against all risks incident to the transportation, save such as result from the act of God or the public enemy, or the fault of the shipper; but with respect to perishable goods, which themselves contain the elements of destruction occasioning their own loss or deterioration, the carrier is not an insurer, but is required to exercise reasonable care and diligence to protect the goods from injury while in its custody, as well as to deliver them with dispatch to the consignee or connecting carrier. *Hutchinson on Carriers*, §§ 652, 334; *Brennisen v. Pa. R. R. Co.*, 100 Minn. 102, 110 N. W. 362. Where goods are transported by two or more successive carriers, it is the prevailing doctrine in this country that if it be shown that the goods were delivered to the initial carrier in good condition, and that they were subsequently delivered to the consignee by the connecting and terminal carrier in bad condition, the presumption of law is, when such last-named carrier is made defendant, that the goods were received by such carrier in the same condition they were delivered to the initial carrier, and the burden is upon the defendant carrier of proving that such goods came to its possession in a damaged condition, by way of defense. *Laughlin v. C. & N. W. Ry. Co.*, 28 Wis. 204; *Savannah, etc., Ry. Co. v. Harris*, 26 Fla. 148, 7 So. Rep. 544; *Penn. R. R. v. Naive*, 112 Tenn. 239, 79 S. W. 130; *Beard v. Ill. Central*, 79 Iowa, 527, 44 N. W. 800; *Cane Hill & Co. v. San Antonio Ry. Co.* (Tex. Civ. App.) 95 S. W. 751; *Elliott on Railroads*, §1450; 3 *Hutchinson on Carriers*, § 1348." * * *

The court reviewed the several exceptions but found no reversible error. On the question of damages the court said:

"The plaintiff's fifth prayer, concerning the measure of damages, ought to have been more explicit as to the manner in which the jury should ascertain the amount of plaintiff's loss; but it is apparent that the defendant was not injured by this defect. It was understood before the peaches were shipped from Cavetown that the plaintiff was to have \$1.50 net per carrier for the peaches in carriers and more if the market would afford it. The plaintiff also testified that the basket peaches were worth seventy-five cents per basket, to him. The sum allowed by the jury to the plaintiff, added to the net amount received by him from the sale of the damaged fruit, only yielded him, in the aggregate, seventy-five cents

per basket for the basket peaches, and \$1.67 per carrier for the carrier peaches, with interest, or but a trifle more per crate than the minimum price he was to receive for them according to his original understanding with the consignee. The plaintiff was entitled to be compensated to the extent of his loss, and we cannot see that the jury was misled by the instructions as granted. Where an erroneous instruction results in no injury to the appellant, this court will not reverse the judgment. *B. & O. R. R. Co. v. Pumphrey*, 59 Md. 402."

Strawberries damaged by delay — Connecting carriers — Burden of proof.

In *SHOCKLEY v. PENNSYLVANIA R. Co.*, (*Maryland Appeals*, December, 1908) 71 Atl. 437, judgment for defendant in the Circuit Court, Somerset county, was affirmed. The opinion was rendered by BRISCOE, J., the facts being stated as follows:

"The suit was instituted as stated by the bill of particulars filed by the plaintiff, for the purpose of recovering damages for the loss of strawberries shipped from Pittsville, Wicomico county, Md., to Seaverns & Co., commission merchants, at Boston, Mass., from May 6, 1903, to June 1, 1903, over and by way of the connecting lines and railroad of the defendant and not transported and delivered with due dispatch by the defendant. The strawberries were delivered and received on the days stated by the Baltimore, Chesapeake & Atlantic Railway Company, the initial carrier, at its station Pittsville, Wicomico county, to be carried to their point of destination, Boston, Mass. They were consigned and waybilled over the following railroads: From Pittsville to Salisbury, a distance of ten miles by the Baltimore, Chesapeake & Atlantic Railway; from Salisbury to Delmar, a distance of six miles, over the New York, Philadelphia & Norfolk Railroad; from Delmar to Philadelphia, a distance of 120 miles by the Delmar Division of the Philadelphia, Baltimore & Washington Railroad; from Philadelphia to Jersey City, a distance of ninety miles, over the defendant's road, an intermediate carrier, known as the New York Division of the Pennsylvania Railroad; and from the last-named point to Boston, over the New York, New Haven & Hartford Railroad, the terminal carrier. The declaration in this case alleges that the defendant (an intermediate connecting carrier) did not transport the strawberries over its road with reasonable dispatch, as it was in duty bound to do, and, by reason of this failure on its part, the strawberries reached their point of destination too late for the market of the day for which they were shipped, and were received in a damaged condition, whereby the plaintiff sustained a heavy loss. The trial resulted in a verdict for the defendant." * * *

"The principal question, however, on the appeal, arises under the third exception, and that is whether the court committed an error in granting the defendant's prayer which withdrew the case from the jury. According to the evidence, the defendant company was an intermediate connecting carrier, its road beginning at Gray's Ferry, Philadelphia, and ending at Jersey City, N. J. Freight shipped from Pittsville to Boston would have to pass over the roads of three other companies—the Baltimore, Chesapeake & Atlantic Railway Company from Pittsville to Salisbury, the New York, Philadelphia & Norfolk from Salisbury to

Delmar; and the Philadelphia, Baltimore & Washington to Gray's Ferry — before reaching the defendant's road, and then, before reaching Boston, the point of destination, would have to pass over the New York, New Haven & Hartford Railroad, the delivering carrier. The grievance complained of by the plaintiff and the substantial cause of the action was the negligence of the defendant company, a connecting carrier, to deliver with reasonable dispatch or on time the freight mentioned in the declaration, and in consequence of this failure they did not reach the point of destination in time for the market of the day for which they were shipped. Under the facts of the case now before us there were five different railroads over which the freight in question had to be carried from Pittsville, Md., the initial point, to Boston, Mass. the point of destination, and the liability of the defendant company as one of the intermediate connecting carriers was confined to the limits of its own road. In other words, it was in duty bound to safely carry with reasonable dispatch over its own road and to safely and promptly deliver without unnecessary delay and detention to the next connecting carrier. The law in this regard has been settled in this State by numerous decisions and by the Supreme Court of the United States. *P. W. B. R. R. Co. v. Lehman*, 56 Md. 233; *Hoffman v. Cumberland R. R. Co.* 85 Md. 394, 37 Atl. 214; *B. & O. R. R. Co. v. Whitehill*, 104 Md. 314, 64 Atl. 1033; *Orem Fruit Co. v. N. C. Ry. Co.*, 106 Md. 16, 66 Atl. 436. In *Myrick v. Railroad Co.*, 107 U. S. 107, 1 Sup. Ct. 425, it was held: 'Each road confining itself to its common-law liability is only bound in the absence of a special contract to safely carry over its own route and safely to deliver to the next connecting carrier, but any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such a liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.' And in *Elliott on Railroads*, § 1435, it is said: 'The majority of our courts have held, in accordance with what is called the 'American rule,' that the mere acceptance of goods directed to a point off the carrier's line is not a sufficient basis for the implication of a contract for extra terminal liability, and that, in the absence of an express contract or of more significant facts or specification than the fact of acceptance as the basis of an implied contract, the initial carrier is discharged by carrying safely to the end of its line and there delivering to the next carrier.'

"There was no contract in this case for extra terminal liability or any facts upon which such a contract could be based, so it is clear the defendant company would be liable only for delays occurring on its own route which could have been avoided by the exercise of reasonable diligence in delivering the freight to the next connecting carrier. According to the evidence in the case, the freight was delivered to the initial carrier, the Baltimore, Chesapeake & Atlantic Railway, at its station at Pittsville, in good condition, on the day it was to be shipped, and the cars were due to leave Pittsville at about 5:30 P. M., but there is no evidence whatever that the train left on time or the hour of the day at which the cars actually left the starting point. The witness Hickey, agent at Delmar of the New York, Philadelphia & Norfolk Railroad and of the Phila-

delphia, Baltimore & Washington Railroad testified as to the time of the arrival of the cars at Delmar, a distance of only sixteen miles from Pittsville, and stated they arrived at different hours, from 8:30 P. M. to 12:52 P. M.

"There is also an absence of evidence as to the time when the cars left Pittsville, Delmar, Salisbury, and Gray's Ferry, or what would be a reasonable time to be consumed in the transportation of the freight over the several roads. There is no evidence whatever as to the time when the freight was received upon the defendants' road or when it was delivered to the next carrier, and it is therefore difficult to see upon what ground it can be asserted that the delay in the transportation of the freight was solely due to the defendant's negligence. The burden of proof was upon the plaintiff to show that the delay occurred upon the defendant's road, and, failing, in this, the court below committed no error in granting the defendant's prayer, which instructed the jury that upon the pleading and evidence there was no legally sufficient evidence to entitle the plaintiff to recover. In this case there was no evidence showing when or where the delay was in fact caused, and, there being no presumption that it happened upon the line of the defendant company, an intermediate carrier, there could be no recovery against the defendant.

"There being no error in the rulings of the court, the judgment will be affirmed."

Wrong delivery of automobile — Carrier liable.

In *WALTHAM MANUFACTURING CO. v. NEW YORK & TEXAS STEAMSHIP CO.*, (*Massachusetts*, January, 1910) 90 N. E. 550, judgment was directed for plaintiff on report of case from Superior Court, Suffolk county. The opinion was rendered by KNOWLTON, CH. J., and the case and ruling is thus stated in the syllabus to the report of the case in 90 N. E. Rep.:

"Plaintiff desiring to ship an automobile to Miami, Fla., shipped it by rail to Boston, and sent defendant a shipping receipt. The shipping receipt and the shipping order gave Miami as the destination, via defendant's steamship line to Key West, with direction to notify M., and the automobile was so marked; but defendant sent a bill of lading, in which Brunswick was stated as the port, instead of Key West, where it was to be delivered to a connecting carrier at the owner's risk, and it also contained the direction to notify M. at Miami. Plaintiff sent the bill of lading to the port of destination, with draft attached for collection. Defendant carried the automobile to Key West and delivered it to a sailing vessel, the master of which took it to Miami and delivered it to M. without requiring the bill of lading or other authority. *Held*, that defendant's duty was to follow the directions in the bill of lading, rather than those marked on the automobile and in the shipping receipt, and its failure so to do rendered it liable for the value of the automobile."

Tomatoes damaged by delay in transit — Measure of damages — Erroneous instruction.

In *PARSONS ET AL. v. LOUISVILLE & NASHVILLE R. R. CO.*, (*Missouri Appeals, Kansas City*, March, 1909) 118 S. W. 101, action for damages for alleged unreasonable delay in the transportation of a car load of tomatoes, judgment for plaintiffs for \$600, in the Circuit Court, Jackson county, was reversed for errors on the question of damages. The court said:

"The instruction given at the request of plaintiffs is erroneous in the measure of damages submitted. Three elements of damage are specifically alleged in the petition, viz., first, that the good tomatoes were depreciated in value seventy-five cents per crate, by a decline in the market; second, that fifty crates were spoiled; and, third, that expense of fifty dollars was incurred in sorting. The instruction does not mention these elements, but directs the jury to assess the damages 'at the difference between the market value of said car load of tomatoes when delivered to plaintiffs and the market value of the same when they would have been delivered to plaintiffs had no such unreasonable delay occurred.' This is the correct rule for the assessment of damages to personal property negligently injured by a carrier in the course of transportation, where the allegations of the petition will warrant its application. But in cases such as the one in hand, where the elements of damages are specifically pleaded, the recovery must be restricted in the instructions to the elements alleged. The rule stated in the instruction does not include the item of the expense of sorting and, therefore, the verdict cannot be said to include that item. * * * There is evidence tending to show greater damage to the 436 crates than that pleaded, and the conclusion cannot be escaped that the jury assessed more damages on that score than were claimed. It is clear the instruction enlarged the scope of the cause of action pleaded and that the error was prejudicial. In other respects the case was fairly tried, but for the error noted, the judgment must be reversed and the cause remanded." Opinion by JOHNSON, J.

Negligent handling of beer in transit — Carrier liable.

In *GOOS v. CHICAGO, BURLINGTON & QUINCY R. R. Co.*, (*Nebraska*, June, 1909) 121 N. W. 963, judgment for plaintiff for \$129 in the District Court, Webster county, was *affirmed*. The action was for damages caused by the freezing of beer transported over defendant's railway, the entire shipment being half a car but the beer was not all destroyed. Judgment was for full amount of claim. Opinion by ROSE, J.

Damages to goods — Connecting carriers — Freight receipts — Evidence — Presumption.

In *GUDE v. PENNSYLVANIA R. R. Co.*, (*New Jersey Supreme*, February, 1909) 71 Atl. 1128, judgment for plaintiff in the District Court of Newark was *reversed*. The opinion was rendered by BERGEN, J., who stated the case as follows:

"The plaintiff recovered a judgment against defendant for damages to goods shipped to him from Brighton, Ohio, and received by the defendant company at Newark, N. J., in a damaged condition. To support his case the plaintiff introduced in evidence a freight receipt for transportation charges, which was made out and delivered by the defendant company in Newark, N. J., the destination of the shipment. The receipt purported to be in the name of 'Union Line,' but immediately under these words there was printed, 'Pennsylvania Railroad Company — Pennsylvania Company.' It was signed by the agent of defendant and, among other things, recited that the goods were shipped by the Union Line from Dayton, Ohio, and that the original point of ship-

ment was Brighton, Ohio. The plaintiff proved the receipt of the goods by the defendant company in Newark, and that they were then damaged; but there was no proof of its condition when delivered in Ohio for transportation. The defendant moved for a nonsuit, upon the ground that the declaration charged that the goods were shipped over the defendant's road from Cincinnati, and there was no proof that they came into the hands of the defendant company, or were delivered to it in good condition. The freight receipt was made out by the duly authorized agent of the defendant company, and its truth is not disputed. If the receipt for freight does not warrant the inference that the 'Union Line' was managed and controlled by the defendant from Brighton, Ohio, then there was no proof that the goods were originally received by the defendant as the initial carrier; but it is admitted that during some part of the route the goods came into the hands of the defendant, and that it was the last of the connecting carriers. We do not think the receipt is evidence that the defendant was the initial carrier, for it states that the original point of shipment was Brighton, and that it was shipped from Dayton, Ohio, over 'C. H. D.,' which the case shows stands for the Chicago, Hamilton & Dayton Railroad, by the Union Line. The utmost that can be inferred from the receipt is that the defendant received the freight from another carrier at Dayton, Ohio, which had brought it from Brighton." * * *

The decision is stated in the syllabus by the court as follows:

"The last of a line of connecting carriers is presumed, in the absence of proof to the contrary, to have received freight in the same condition in which it was delivered to the initial carrier, and, if it appears to have been shipped in good order, and is in a damaged condition when the last carrier offers to deliver it, a presumption arises that the injury resulted from the negligence of the last carrier; but if there be no proof that the freight was in any other condition when it was delivered to either of the preceding carriers than is found in the hands of the last carrier, the presumption of negligence on the part of the final carrier does not arise, for there must be some proof of a change in condition of the freight between shipment and delivery, to warrant the presumption that a different condition exists because of negligence of the carrier."

Loss of box delivered to express company — Liability.

In *HILL (to use of FERRIS) v. ADAMS EXPRESS CO.*, (*New Jersey Supreme*, December, 1908) 71 Atl. 683, judgment for plaintiff for \$300, in the District Court of Camden, was *affirmed*. Opinion by GARRISON, J. (See also 74 N. J. Law, 338, 68 Atl. 94). The case and points are stated in the syllabus by the court as follows:

"1. A transcript of the stenographic report of the proceedings and testimony, certified by the judge of the District Court under chapter 138, p. 259, of the Laws of 1905, although not transmitted to the clerk of the Supreme Court within fifteen days by the party suing out a writ of certiorari, may be treated as part of the return to such writ when the defendant in certiorari has made no objection to such state of the case under the thirty-second rule of this court, and no preliminary motion to strike out such part of the return has been made.

"2. A box to be shipped by Adams Express Company to Ireland was called for at the residence of the shipper by a driver of a local transfer company and delivered by him to the express company with a prepayment of the charges, nothing being asked or said as to valuation. The receipt that was handed to the driver of the transfer company by the express company was delivered by him to the shipper two days later, at which time the box, while in the possession of the express company, had already been destroyed by fire. In an action brought by the shipper against the express company for the value of the box:

Held, that a motion to nonsuit was properly denied, and that a request that the plaintiff's recovery be limited to fifty dollars, pursuant to a provision in the express receipt, was properly refused.

"3. Where a shipper employs a common carrier (in this case the Union Transfer Company) to carry goods to an express office (in this case Adams Express Company) for shipment, the driver of the wagon of the local carrier who delivers the goods to the express company is not a servant or agent of the shipper with whom the express company may make a special contract binding the shipper, in the event of loss, to a limitation of such carrier's common-law liability.

"4. Where the adjustment of a claim of loss against an express company was referred by its main office in New York to the general manager of its Philadelphia office, who took the matter up with a representative of the plaintiff, the relevant declarations made by such general manager in the course of such negotiations and germane to the matter in hand are admissible in evidence against the express company in an action between the same parties growing out of the same transaction."

Goods lost in transit — Request to return goods — Indemnity to carrier.

In *ERIE R. R. CO. v. CAPPEL*, (*Ohio Supreme*, March, 1909) 88 N. E. 144, judgment for plaintiff in the Circuit Court, Montgomery county, was *reversed*. The facts are stated in the opinion by DAVIS, J., as follows:

"The plaintiff in error received from the defendant in error a box of umbrellas consigned to persons at Marietta, Indian Territory, and agreed, by the terms of the bill of lading, to carry the goods to the destination if on its road, otherwise to deliver to another carrier on the route to the destination of the goods. The road of the plaintiff in error terminates at Chicago, and beyond its line the goods were transported by connecting carriers to the point of destination in good condition and in due time. The goods were not delivered to the consignees because they refused to accept them, having become insolvent. The Erie Company's agent notified the defendant in error that the goods were at a railway station at destination and undelivered because the consignees had failed and quit business. Thereupon the defendant in error signed an indemnity contract of the Erie's usual and regular form, as follows: 'May 29, 1902. To Erie Railroad Company: The undersigned shipped by the Erie Railroad from Dayton to Marietta, I. Ty., March 15, 1905, marked Freeman Bros., Marietta, I. Ty., one box umbrellas. Please use all available means to stop for me the above-mentioned articles before delivery to consignee, and return same to me at Dayton, Ohio, and, in consideration of your effort in my behalf, I hereby agree to

indemnify you against, and save you harmless from, any suit or legal proceedings, loss, damage, expense, counsel fees, cost and charges arising from or caused by your attempt to comply with this request. The full meaning and intent of this agreement being that you are to act as my agent in this transaction. A. Cappel' The company always exacted that form of a contract unless plaintiff surrendered the original bill of lading, which was not done in this case. After the execution of the indemnity contract a request for the return of the goods was forwarded through the different connecting lines to Marietta, Ind. T., and the goods were stowed on the return, but were lost somewhere in transitu, never having reached the Erie road on the return. The defendant in error, alleging a verbal agreement by the plaintiff in error, in consideration of the usual freight charges, to return the shipment to the defendant in error, at Dayton, Ohio, sued to recover the value of the goods less the usual freight charges. He obtained a judgment therefor in the Court of Common Pleas, which was affirmed by the Circuit Court."

* * *

The point decided, which reversed the judgment, is noted in the syllabus by the court as follows:

"When goods have been carried over connecting lines to the point of destination and there refused by the consignee, and the shipper, on receiving notice thereof, in writing appoints the company owning and operating one of the lines of his agent to stop the goods for him before delivery to consignee and return the same to him, and agrees to indemnify and save harmless such company from any suit or legal proceedings, loss, damage, expense, counsel fees, costs, and charges arising from or caused by its attempt to comply with the request, such writing does not imply a verbal contract by such company to transport and safely carry the goods over all the connecting lines, and such company will not be liable for loss of the goods or damage thereto, occurring on the return without its fault and not on its own road."

Goods damaged by flood — Carrier liable.

In *CHICAGO, ROCK ISLAND & PACIFIC RY. CO. v. LOGAN, SNOW & Co.*, (*Oklahoma Supreme*, May, 1909) 105 Pac. 343, judgment for plaintiff in the District Court, Kingfisher county, in action for damages to certain goods and merchandise delivered to defendant for transportation over its railway, was *affirmed*. The opinion was rendered by WILLIAMS, J., and the facts and points decided are stated in the syllabus by the court as follows:

"1. A motion to require the plaintiffs' petition to be made more definite and certain being overruled, it affirmatively appearing from the record that the defendant was not prejudiced thereby, the ruling of the lower court thereon will not be disturbed.

"2. Whenever a carrier seeks to excuse itself for loss occurring on account of an act of God, or some irresistible superhuman cause, the burden of proof rests upon the carrier.

"3. It appearing that the goods delivered to the plaintiff in error, as a common carrier, were placed in a sealed car and set upon a switch for transit, and an unprecedented flood came in such intensity, volume, and so sudden and extraordinary as to constitute an irresistible superhuman

cause, no evidence being offered by the carrier as to the condition of the car after the flood, the goods in question being not identified in the car after the flood, the flood waters rising eight feet from the ground where said car was standing, the perishable goods contained in the cars caught in the flood being 'dumped' in the Kaw or Kansas river, but the goods in controversy not being of that character, all of the goods identified being forwarded to their proper destination, those that could not be identified supposedly or probably being forwarded to the claim department in Chicago, the goods in controversy never reaching their proper destination, and no showing being made in regard to the same by the claim department at Chicago, *held*, that the verdict of the jury against the carrier will not be disturbed. (DUNN, J., *dissented*)."

Grain lost in flood—Carrier liable.

In SMITH ET AL. v. BALTIMORE & OHIO R. R. Co., (*Pennsylvania*, January, 1909) 72 Atl. 264, judgment for plaintiffs in the Court of Common Pleas, Allegheny county, was *affirmed*. The case is stated in the opinion by FELL, J., as follows:

"This was an action to recover damages for the loss of four car loads of grain delivered to the defendant at Chicago for carriage to Pittsburg. The cars were not taken into Pittsburg, but were placed in the defendant's hay and grain yard on the opposite side of the Allegheny river, at South avenue, Allegheny City. While the cars were in this yard awaiting delivery to the plaintiff, there was a flood in the river, the yard was overflowed, and the grain was injured. It was averred in the statement of claim that the cars were diverted from the usual and proper course of transit by placing them in the South avenue yard, instead of carrying them to the defendant's yard in Pittsburg, and that the defendant was afterwards negligent in not removing the cars to a place of safety."

* * *

"The main contention of the defendant was that the flood was extraordinary and unprecedented, and that adequate measures had been taken to guard against any danger that could reasonably have been anticipated. The cars were placed in the yards at different times on March 13, 1907. There was then a flood in the river, and at places the defendant's tracks were covered with water. A rise of thirty feet would put water in the bottom of the freight cars in the yard. The water rose constantly all day, and at five P. M. the yardmaster had information that the water would rise twenty-six or twenty-eight feet, and possibly higher, and he provided for a rise of thirty feet. At two A. M. on the 14th, the water had risen a height of twenty-eight feet, and was still rising. An attempt was then made to move the cars, but it was unsuccessful because logs and rafts had been washed on the tracks, and the cars were derailed by them. The yardmaster relied for information on the local forecaster of the weather bureau, and the manager of a river coal company, whose experience and knowledge gave weight to his opinion. These were probably the best authorities available. The yardmaster relied upon them implicitly, and went to his home at five o'clock on the 13th and his assistant left at nine o'clock. The assistant yardmaster testified: 'The water was rising rapidly. We expected it at any moment to shut us out. The

warning we got was that we would get from twenty-six feet to twenty-eight feet. That was all the warning we got, except they said, of course, it may go higher. This is the information they gave, and we didn't go on what 'may be.' A witness called by the defendant, who for twenty-seven years had been the manager of steel works a quarter of mile below the defendant's yard, testified that he had received information from the weather bureau and the river coal company at five o'clock on the 13th, that the rise of water would not exceed twenty-seven feet, but that the forecast was so at variance with the actual conditions, there having been a heavy snowfall and continuous rain and a rapid rise in the river, that he did not believe it correct, and protected his property against a rise of thirty-two feet during the night and thirty-four feet the next morning.

"The defendant's employees were not required to guard against a rise of water not reasonably to be expected. But they knew that floods in which the river rose over twenty-eight feet, were not unusual. It had been above that height four times in the five preceding years, and within that period had reached a height of 32.4 feet. They knew that during the day there had been a continuous and rapid rise in the river. Whether with this knowledge they were negligent in placing implicit reliance on the reports received from the weather bureau and the river coal company, and in not removing the cars to higher ground, was a question not to be withdrawn from the jury. The judgment is affirmed."

Sample case destroyed by fire in baggage room — Carrier liable.

In *DESCHAMPS v. ATLANTIC COAST LINE R. R. Co.*, (*South Carolina, April, 1909*) 64 S. E. 144, judgment for plaintiff in the Common Pleas Circuit Court of Sumter county, was *affirmed*, the facts being stated by Woods, J., as follows:

"A few days before February 24, 1907, the plaintiff checked from Charleston, S. C., to Sumter, S. C., on defendant's railroad a case containing one Gold Medal Computing Scale, used by him as a sample in his business as traveling salesman. It does not appear when the scale reached Sumter, but it was in the defendant's baggage room at Sumter, on February 24, 1907, when a fire occurred destroying defendant's depot, including the baggage room. Plaintiff, in his complaint against the defendant, alleged the scale and case to have been destroyed, and sought to recover their full value, \$122.50. The evidence tended to show injury only, and the jury found a verdict for fifty dollars."

Machinery damaged — Measure of damages — Erroneous instruction.

In *McMEEKIN v. SOUTHERN RY. Co.*, (*South Carolina, April, 1909*) 64 S. E. 413, judgment for plaintiff in the Common Pleas Circuit Court of Fairfield county, was *reversed*, the case being stated by Woods, J., as follows:

"The plaintiff, H. A. McMeekin, in the latter part of July, 1906, through W. R. Rabb & Co., in Winnisboro, S. C., ordered from a firm in Atlanta, Ga., a sawmill outfit. Upon arrival of the machinery at Rockton, S. C., plaintiff's station, it was discovered that material parts, a husk frame and pulley, were missing. On the 4th of August plaintiff gave notice to Estes, defendant's agent at Rockton, of special damage accruing to his business

because of the delay, and, after waiting about ten days, ordered another husk frame and pulley. The missing portion of the first shipment never arrived and the second consignment was not received until 6th September. Plaintiff brought this action for the value of the lost husk frame and pulley, and for special and punitive damages for the loss incurred. On defendant's motion the trial judge granted a nonsuit as to punitive damages. Defendant's counsel admitted liability for seventy-seven dollars, the value of the lost portions of the machinery first shipped, and the court submitted to the jury the issue of special damages. The jury brought in a verdict of \$617 for the plaintiff, and the defendant appealed. The appeal is based upon the alleged errors of the Circuit Court in admission of testimony, in the charge of the jury, and in the refusal of motions for non-suit, for direction of a verdict, and for a new trial."

* * *

On the exceptions as to damages the court said:

"As to the measure of damages the Circuit Court charged as follows: 'In arriving at these damages I charge you, when the carrier accepts the goods for transportation with notice that the owner requires them at the place to which they are to be carried for a special business purpose, the measure of damages for delay in carriage is the expense and detriment to the special business, with reference to which the carriage was undertaken, fairly attributed to the delay, including expense and loss of time reasonably incurred in the effort to find the delayed property, or anything of that sort. This does not include speculative profit resting on the mere hope of particular future transactions.' This instruction was very general, but there was no exception to it as a statement of law. The defendant, however, made a motion for a new trial on the ground that there was no evidence to support a verdict for \$617. The exception on this point must be sustained. The plaintiff's business had not been launched, and therefore he could not recover profits he expected to make. *Tappan & Noble v. Harwood*, 2 Speer, 536; *Bird v. Tel. Co.*, 76 S. C. 345, 56 S. E. 973; *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, 62 S. E. 150. The mill was not erected, and it was impossible to anticipate the conditions which would exist at the time of completion. Indeed, it might be that the mill would never be completed. For these reasons there would be no reasonably certain basis upon which to compute the measure of damages for rental value, as in the case of a stoppage of a completed ginning plant, like that in the *Standard Supply Co. v. Carter & Harris*, *supra*. The true measure of damages, therefore, in this case is the loss of to the business of constructing a mill. The loss to the business of construction was the interest on the money invested in the work of construction, and the wages of the laborers employed for construction, reduced by the earnings which the plaintiff either received, or by reasonable diligence could have received, from the employment of such laborers in other work. *Saluda Mfg. Co. v. Pennington*, 2 Speer, 746. There was nothing in the record to show the exact day on which the second shipment was ordered, but it was alleged by the plaintiff that it was about ten days after the notification to Estes of special damages. Taking the view most favorable to the plaintiff, and assuming the date to be 14th of August, it was only twenty-three days from that time to the

arrival of the freight on 6th September. The plaintiff employed six hands, and paid them ten dollars a month and board. There was nothing in the record to show that the interest on the capital invested in the sawmill outfit was very large; and the sum of these losses, even leaving out of consideration a reasonable return which the plaintiff might have derived by ordinary diligence in engaging his laborers in other work, must have been far less than \$617, and that finding by the jury was plainly excessive."

**Delay in transporting shipment of fertilizers—Statutory penalty—
When carrier not liable.**

In *FULLERTON v. ATLANTIC COAST LINE R. R. Co.*, (*South Carolina*, April, 1909) 64 S. E. 142, judgment for defendant in the Common Pleas Circuit Court of Bamberg county was *affirmed*. The action was brought to recover damages for alleged unreasonable delay in transporting a shipment of fertilizers and to recover the statutory penalty (Stat. of March 25, 1904, 24 Stat at Large, pp. 671, 672). The facts were stated by JONES, J., who held that it was proper to direct a verdict for defendant. Continuing the court said:

"Under the statute the penalty can only be recovered 'by any consignee who may be injured in any way by such delay or by the owner or holder of the bill of lading.' The plaintiff was not shown to be either the owner or holder of the bill of lading or injured consignee at the time of the commencement of the action. It was incumbent upon the consignee to prove that he was injured by the delay. *Muckenfuss Mfg. Co. v. Charleston & W. C. Ry. Co.* (S. C.) 63 S. E. 747. While not absolutely conclusive, the cases of *Best v. Railway Co.*, 72 S. C. 479, 52 S. E. 223, *Macon v. Railway Co.*, 81 S. C. 167, 62 S. E. 6, and *Matheson v. Railway Co.*, 79 S. C. 158, 60 S. E. 437, tend to show that plaintiff had no cause of action against the defendant for the penalty."

Loss of Steel traps—Statutory penalty—Carrier not liable.

In *BULLOCK v. CHARLESTON & WESTERN CAROLINA RY. CO.*, (*South Carolina*, April, 1909) 64 S. E. 234, judgment for plaintiff in the Common Pleas Circuit Court of Abbeville county, was *reversed*. The opinion by JONES, J., stated the case as follows:

"This action was commenced in a magistrate's court for the recovery of the value of two dozen steel traps, alleged to have been lost while in the possession of the defendant company, and also the recovery of the statutory penalty of fifty dollars under the Act of February 23, 1903 (24 St. at Large, p. 81). The judgment of the magistrate for the full amount and penalty was affirmed by the Circuit Court, overruling defendant's exceptions." * * *

"The measure of the carrier's liability at common law for negligent delay in the transportation of goods is the depreciation in market value of the goods at the time and place they should have been delivered and the market value, according to their condition, at the time and place of actual delivery or tender, together with any reasonable loss or expense proximately caused by such delay. *McKerall v. R. R. Co.*, 76 S. C. 341, 56 S. E. 965. The liability under the statute is 'for loss of or damage to' the goods, together with penalty for failure to adjust or pay the claim

therefor within the prescribed time. The claim may be filed for loss after the lapse of a reasonable time for the arrival of the goods, and in an action under the statute recovery may be had for any loss of or damage to goods that may be shown; but no recovery of the penalty can be had unless there be a recovery for the full amount of loss of or damage to goods claimed. There being no evidence of such loss or damage to the extent of \$7.25, the amount of the claim as filed, it was error to instruct the jury that recovery should be had for such sum and the penalty if the defendant had been negligent in tracing the goods."

Loss of freight — Statutory penalty — Carrier not liable.

IN *COUSAR MERCANTILE CO. v. SOUTHERN RY. CO.*, (*South Carolina*, April, 1909) 64 S. E. 391, judgment for plaintiff in the Common Pleas Circuit Court, Chester county, was *reversed*. The opinion by JONES, J., states the case as follows:

"The plaintiff recovered judgment against defendant for \$80.84, for the value of a shipment of freight alleged to have been lost and fifty dollars penalty for failure to adjust the claim filed for said loss within ninety days. It appeared that the freight was delivered to the defendant at South Boston, Va., on December 12, 1906, for delivery to the plaintiff, consignee, at Chester, S. C. The goods not having arrived by January 2, 1907, plaintiff on that day filed its claim as for lost goods valued at \$80.84. There was some evidence that such a delay was unusual and unreasonable. The plaintiff's testimony was to the effect that notice of the arrival of the goods at Chester, S. C., was given plaintiff on February 19, 1907, and that plaintiff declined to receive the goods at full value; the goods being heavy winter dry goods. There was no evidence that the goods had been damaged in any way. The packages were not broken. The goods were not examined. John G. Cousar, secretary and treasurer of the plaintiff corporation, testified that plaintiff was liable for the price of the goods, and was 'aggrieved' by the nondelivery of the goods \$80.84, their value. A motion for nonsuit was made on the grounds, 1, that no case under the statute had been made out; 2, that it appears from the undisputed testimony that the claim was filed for the loss of the goods, and that the goods were not lost, and that recovery for the penalty can be had only in case of loss of or damage to freight; 3, that the testimony shows that plaintiff as consignee has not been injured or aggrieved. The motion was overruled, and defendant excepts.

"The terms of the penalty statute material to the issue are: 'Sec. 2. That every claim for loss of or for damage to property while in possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this State, and within ninety days, in case of shipments from without this State, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor, until the payment thereof.

Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, that unless such consignee or consignees recover in any such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage with interest as aforesaid. * * * In order to recover under this statute, plaintiff must show loss of, or damage to, the specific freight as distinguished from damage to plaintiff in consequence of delay in its transportation. For delay in transportation, the Act of 1904 (24 St. at Large, p. 671) provides a remedy with penalty, and it has been declared that such statute has no reference to the loss of or damage to freight. *Macon v. Southern Ry. Co.*, 81 S. C. 168, 62 S. E. 6. On the other hand, it has been declared that the Act of 1903 (24 St. at Large, p. 81), the statute in question, provides for the adjustment of claims for loss of or damage to freight, and does not cover claim for delay in transportation. *Moody v. Railway Co.*, 79 S. C. 300, 60 S. E. 711. This last case shows that, notwithstanding the delay, the plaintiff was bound to receive the goods, and that the carrier's liability was to compensate for the damages growing out of the delay, but not for loss; the court citing *Nettles v. Railroad Co.*, 7 Rich. Law, 190, 62 Am. Dec. 409, and other cases. The penalty statute does not abrogate this well-established rule of law. The statute allows recovery for loss or damage, and, if the claim were filed for loss of freight and the proof showed only damage to freight, or vice versa, the court might not turn the plaintiff out, but might allow recovery for whatever loss of freight or damage to freight was established. But, in order to recover the penalty, it would be necessary to recover for loss or damage the amount of the claim as filed.

"It appearing that there was no loss of freight, and, there being no testimony of any damage to the specific freight, nonsuit should have been granted. It is true there was testimony that the goods were seasonable goods, heavy winter dry goods, and that while shipped December 12, 1906, were not tendered until February 19, 1907, when the winter season had far advanced, but the goods were intact, and not shown to have been damaged in the least. It is true, also, that Mr. John G. Cousar testified that plaintiff was 'aggrieved' to the amount of \$80.84, the value of the goods, because of the nondelivery, but this merely meant that such was his estimate of the damages resulting from delay in shipment under the mistaken theory that plaintiff could treat the goods as lost. It was impossible for the jury on the testimony to conclude that the goods had been damaged to the full extent of their value." * * *

Delay in transportation of freight — Statutory penalty — Carrier liable.

In *FARRELL v. ATLANTIC COAST LINE R. R. Co.*, (*South Carolina*, April, 1909) 64 S. E. 226, judgment for plaintiff for ninety dollars in the Common Pleas Circuit Court of Dorchester county, was *affirmed*. The action was for recovery of penalty under the Act of March, 1904 (24 Stat. at Large, pp. 671, 672) for delay in transportation of freight. The court (per JONES, J.) held that the Act did not violate the equality clause of the Federal Constitution,

nor did the question of violation of the interstate commerce clause in said Constitution arise in an action to recover the penalty for delay in transportation of goods between two points within the State.

Loss of cigars — Carrier liable.

In *TENHET v. ATLANTIC COAST LINE R. R. Co.*, (*South Carolina*, April, 1909) 64 S. E. 232, judgment for plaintiff in the Common Pleas Circuit Court of Marion county, was *affirmed*. "The Circuit Court affirmed the judgment of the magistrate court in this action for damages for the alleged loss of one case of cigars valued at \$23.50 while in the possession of defendant carrier, and for the fifty dollars penalty under Act February 23, 1903, 24 St. at Large, p. 81" Opinion by JONES, J.

Delay in transportation of lumber — Statutory penalty — Carrier liable,

In *MILLS v. SOUTHERN RY. Co.*, (*South Carolina*, April, 1909) 64 S. E. 238, judgment for plaintiff in the Common Pleas Circuit Court of Chester county, was *affirmed*. The opinion by WOODS, J., states the case as follows:

"The complaint in this action alleges a delay of thirteen days in the transportation of a car load of lumber from Westville, in Kershaw county, a station on defendant's railroad, to Smith's in York county, another station on defendant's railroad, not over 100 miles distant. Judgment was demanded on account of this delay for sixty-five dollars as the amount of the statutory penalty at five dollars a day for thirteen days, and for \$200 special damages. At the trial plaintiff's counsel conceded that there was no evidence warranting the recovery of special damages, and the jury found a verdict for fifty dollars for the statutory penalty of five dollars a day for ten days. The appeal involves the construction of these portions of the Penalty Act of March 26, 1904 (24 St. at Large, p. 671):

"Section 1. Be it enacted by the General Assembly of the State of South Carolina, that from and after May 1st, 1904, all railroad companies doing business in this State shall transport to its destination all freight received by them for transportation within this State within a reasonable time after receipt thereof, not exceeding the following times after midnight of the day of the receipt thereof, to wit: Between points not over 100 miles apart, seventy-two hours: * * * Provided, that notice be given to the receiving company that prompt shipment of such freight is required, and when requested, such company shall insert in the bill of lading the words, "Prompt shipment required," which shall be conclusive evidence of such notice, and each such company shall extend such notice to its connecting line or be liable for the consequences of its failure to do so.

"Sec. 2. That any such company failing to comply with the provisions of this Act, except for good and sufficient cause, the burden of proof of which shall be on the company so failing, shall be subject in addition to the liabilities and remedies now existing for unreasonable delay in the transportation of freight, to a penalty of five dollars per day for every day of delay in excess of the time hereinbefore limited, to be recovered by any consignee who may be injured in any way by such delay, or by the owner or holder of the bill of lading, in any court of competent jurisdiction." * * *

"The Act is penal and must be strictly construed, but this rule is quite consistent with the requirement that all statutes must be interpreted in view of the design of their enactment. The legislative design in statutory enactment ought not to be cut short by narrow verbal distinctions, nor enlarged into oppression by giving to the words used too broad a signification. This statute requires notice that prompt shipment is required without expressly fixing the time of such notice. But evidently the General Assembly did not mean that the notice might be given at any time, however remote before the shipment. A statute with that meaning would be oppressive, because the burden on the railroad company of keeping in the minds of its agents notices given in the remote past that prompt shipment would be required of freight afterwards to be shipped would be intolerable. On the other hand, the construction that the notice must be given at the very instant of shipment would be very narrow. The fair construction is that the statute requires the notice to be given within such time before shipment that the agent of the carrier, notwithstanding the other duties devolving on him, by the exercise of reasonable diligence may keep the requirement in mind. It follows that the position of the defendant that the notice must be given at the exact time of the shipment is not tenable. The statute makes it clear that the notice must be given to the shipping agent, and not to any agent of the defendant, for he is the agent who issues the bill of lading, and upon whom, therefore, must devolve the duty to insert in the bill of lading on request the words, 'Prompt shipment required.' But it is not necessary, as defendant insists, that he must receive the notice direct from the consignee or the owner or holder of the bill of lading. The statute lays down no particular method of giving the notice, and therefore notice given by the consignee or owner or holder of the bill of lading through another is sufficient. In this view, the testimony that the notice was given by the agent of the owner and holder of the bill of lading to the agent of the defendant at Kershaw, and by him extended to the defendant's shipping agent at Westville, was competent; and it was not error for the Circuit judge to refuse to instruct the jury that there was no evidence of the notice required by the statute. The court having decided in the case of *Muckenfuss Manufacturing Co. v. C. & W. C. Ry. Co.* (recently filed) 63 S. E. 747, that proof of injury is not necessary to sustain an action by the owner or holder of the bill of lading to recover the statutory penalty for delay in the transportation of goods, the exceptions on that point cannot be sustained."

Statutory penalty — Carrier liable.

In *BERLEY & KYZER v. COLUMBIA, NEWBERRY & LAURENS R. R. Co.*, (*South Carolina*, April, 1909) 64 S. E. 397, judgment for plaintiffs in the Common Pleas Circuit Court of Lexington county, was *affirmed*. "The plaintiffs on November 15, 1906, filed with defendant's agent at Irmo, a station on defendant's railroad, a claim for \$1.84 for fifty feet of iron piping, shipped from Columbia and consigned to the plaintiffs at Irmo. This action was brought for the amount of the claim and the statutory penalty of fifty dollars for failure to adjust and pay the claim within forty days from the date of filing it with the defendant. The judgment of the magistrate for the amount of the

claim and penalty was affirmed by the Circuit Court." Opinion by Woods, J. "The statute of 1903 (24 St. at Large, p. 81) requires that the claim shall be presented to the agent at the point of destination, but it does not provide for the place of payment. The obligation, therefore, is on the carrier to find the claimant and tender payment to him within the period fixed by the statute."

Household goods damaged — Connecting carriers — Law of place — Interstate Commerce — Limiting liability — Damages.

In *ATCHISON, TOPEKA & SANTA FE RY. CO. v. SMYTHE*, (*Texas Civil Appeals*, May, 1909) 119 S. W. 892, judgment for plaintiff in the District Court, Harris county, was *affirmed*. The case is stated in the opinion by McMEANS, J., as follows:

"Appellee, J. H. Smythe, instituted this suit against the appellant, Atchison, Topeka & Santa Fe Railway Company, and the Gulf, Colorado & Santa Fe Railway Company, for the recovery of \$1,950 as damages growing out of the shipment of a car load of household goods from Houston, Tex., to Los Angeles, Cal.; it being charged in appellee's petition that through the negligence of the carriers the goods were badly damaged in transit. Appellant pleaded the general issue, and specially pleaded that under the terms of the contract of shipment the liability of each carrier was limited to such loss or injury as occurred on its own line, and that no loss or injury occurred on its line. It further pleaded that under the terms of said contract it was provided that, in case of loss or injury, the amount to be recovered should be based on a valuation of five dollars per 100 pounds, that said contract was legal and valid under the laws of the State of California, where the shipment was delivered, and that five dollars per 100 pounds for such goods as were lost or damaged in transit was tendered to appellee. There were other pleadings filed by the parties, but it is believed that the above will be sufficient to indicate the issues involved. The case was tried before a jury, and a verdict and judgment, based upon special issues, was rendered for appellee and against the appellant, Atchison, Topeka & Santa Fe Railway Company, for \$1,676.87, of which sum appellee entered a remittitur of \$325. Judgment was rendered on the verdict of the jury in favor of the Gulf, Colorado & Santa Fe Railway Company. This appeal is prosecuted by the Atchison, Topeka & Santa Fe Railway Company alone.

"The car of household goods in question was shipped to appellee from Houston, Tex., to Los Angeles, Cal., over the lines of the Gulf, Colorado & Santa Fe Railway Company and the Atchison, Topeka & Santa Fe Railway Company under a through bill of lading, and was delivered by the former to the latter at Purcell, Okl. The goods, at the time of their delivery to the initial carrier, were in good condition and were well packed and braced in the car when loaded at Houston; but before the same reached Los Angeles, the goods while in transit were transferred to another car, and when they reached their destination were scattered all around in the car and were badly damaged. There was no testimony to show on what line of railway the damage occurred, and none offered by either carrier to show its freedom from negligence. At the time of the issuance of the bill of lading by the initial carrier, the appellee signed a special contract, by the terms of which the liability of all carriers con-

cerned in the transportation of the shipment, for loss or injury, was released or limited to five dollars per 100 pounds of the goods shipped. This contract is as follows: 'Whereas, the undersigned consignor has delivered for transportation to Gulf, Colorado & Santa Fe Railway Company, at the above station, a quantity of household goods, furniture and emigrants' movables, consigned to J. H. Smythe at Los Angeles, described as follows: Car H. H. Goods; and, whereas, said consignor desires to secure the benefit of the lower or special rate applicable only to such transportation at "owner's risk" upon the valuation and conditions hereinafter expressed: Now, therefore, said railway company agrees to charge for such transportation the lower or special rate applicable to shipments, based on such valuation and the conditions hereinafter stated, and receives said goods for transportation upon the terms herein stated; and said consignor hereby represents and agrees that the value of the above property does not exceed five dollars (\$5.00) per hundred pounds, and that in case of any loss or damage to the same said railway company, or any connecting carrier transporting the same, shall not be liable for any greater amount, and that neither said railway company nor any other connecting carrier over whose lines such property may be transported shall be liable for damages to said property by chafing or breaking or from damage of any kind, except such as may occur from negligence of the carrier by collision of trains, or by cars being thrown from the track in course of transportation, and that, if the property shall pass over the road of another company to reach its destination, the company upon whose road the loss, injury or damage may occur shall alone, if at all, be liable therefor, and the above railway company shall not be liable for any loss or damage thereto or any delay in transportation or delivery thereof by any connecting or succeeding carrier or company, and that no claim for loss of or damage to the above property shall be valid unless presented to the railway company in writing within thirty (30) days after said property shall have been delivered.'

"It was shown that the freight rate on household goods from Houston to Los Angeles, where the five-dollar release clause was signed, was one dollar per 100 pounds, and where such a contract was not signed the rate was \$1.60 per 100 pounds. After appellee received the goods at Los Angeles, he wrote to the agent of appellant there as follows: 'Inclosed is a list of the goods damaged and for which I wish to make a claim. Your assistant claim agent was here and examined the damages and has a list also.' Then follows a list of articles in which the weight of each is given. Some days later appellee wrote the following letter to appellant's claim agent: 'In reference to your recent request for bill of repairs to furniture damaged in shipment from Houston, Texas, to this city for which claim has been entered by J. H. Smythe, would state that the extent and nature of the damage is such that we have not at the present date felt able to afford to have repairs made. A greater part of this furniture was new before shipment, and for this reason special car was chartered in order that it might be shipped without damage. We assume that the furniture, by its appearance and condition on arrival, had been laying on the prairie for two or three ——— between its transfer from the original car 24117 to car 2810. Under these conditions, I

believe that a settlement could be made under the conditions printed on the waybill, viz., five dollars per 100 pounds, and I am anxious to have the matter adjusted as soon as possible.' Appellee testified that in giving the weight of the articles he was expecting to get a settlement based on weight."

The court reviewed the several assignments of error and, among its rulings, said:

"It seems to be well settled by the decisions of the courts of this State that, when goods are received in good condition by the initial carrier, and delivered by the terminal carrier in a damaged condition, a *prima facie* case is made against the delivering carrier. *Railway Co. v. Edloff*, 89 Tex. 458, 34 S. W. 414, 35 S. W. 144; *Railway Co. v. Adams*, 78 Tex. 372, 14 S. W. 666. In such case, in the absence of any proof to the contrary, it will be presumed that the loss or damage was caused by the negligence of the terminal carrier (*Railway Co. v. Ball*, 80 Tex. 606, 16 S. W. 441), and in order to meet the case so made, it devolves upon the terminal carrier to show that the damage did not occur on its line (*Railway v. Edloff*, *supra*; *Railway Co. v. Mazzie*, 29 Tex. Civ. App. 295, 68 S. W. 56; *Railway Co. v. Manufacturing Co.*, 79 Tex. 28, 14 S. W. 785; *Railway Co. v. Richmond*, 73 Tex. 571, 11 S. W. 555." * * *

"But appellant contends that the shipment in question being an interstate shipment, and the contract in question being valid under the laws of the State of California where delivery was to be made, the laws of that State should control, and the contract should be enforced by the courts of Texas. An answer to this contention is that it was not shown what the laws of California in this regard are; hence, in the absence of such proof, the courts of this State will presume that they are the same as those in Texas. *James v. James*, 81 Tex. 381, 16 S. W. 1087. While Congress under its power may provide for contracts for interstate commerce permitting carriers to limit their liability to a stipulated valuation, it does not appear that Congress has, up to the present time, sanctioned contracts of this nature; and, in the absence of congressional legislation on the subject, a State may require common carriers, although in the execution of interstate business, to be liable for the whole loss resulting from their negligence, a contract to the contrary notwithstanding; and this is true whether the degree of care and responsibility required by any State is enacted into a statute or results from the rules of law enforced in its courts. *Penn. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132. Article 320, Rev. St. 1895, provides, in effect, that common carriers within the State shall not limit their liability as it exists at common law. Manifestly this statute does not affect contracts made for interstate shipments, nor does it purport to do so. There being then no enactment of Congress or statute of this State controlling the common law, which prohibits a carrier from making terms which will exempt it from liability for the negligence of itself or its servants, and under which the carrier is an absolute insurer of the goods transported, subject to certain well-defined exceptions, controls. *Texas & P. Ry. Co. v. Richmond*, 94 Tex. 575, 63 S. W. 619. This being true, it follows that, as under the common law a carrier cannot limit its liability for damages caused by its negligence, nor restrict by contract the extent of its responsibility to a less

sum than the damages actually caused by it, and, as the common law as affecting such matters is in force in this State, the contract in question must be held inoperative and void." * * *

"The measure of damages where household goods in use are injured while being transported by the carrier, is the difference in their actual value just prior to and just subsequent to the injury, and not the difference in the market value." * * *

Household goods damaged — Measure of damages — Erroneous instruction.

In *TEXAS CENTRAL R. R. CO. v. WATSON*, (*Texas Civil Appeals*, March, 1909) 118 S. W. 175, it appeared that plaintiff recovered a judgment in the Jones County Court for damages to certain household goods shipped by him over defendant's line and a connecting carrier. Defendant appealed and judgment was *reversed* for errors in charge on measure of damages. Opinion by SPEER, J. "The measure of appellee's damages will be the difference in the value of his household goods in the condition in which they were delivered to him at Stamford [point of destination] and the condition they would have been in had there been no negligence on the part of appellant; and in determining these values the Stamford values should be used, and not those of Llano [point of shipment]."

Cabbages damaged — Refrigerator car — Connecting carriers — Liability.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS ET AL. v. MCLEAN, (*Texas Civil Appeals*, March, 1909) 118 S. W. 161, was an action against the Missouri, Kansas & Texas Ry. Co. and the Gulf & Interstate Ry. Co., to recover damages to nine shipments of cabbages from various points to various destinations. The case was tried in the District Court, Jefferson county, without a jury and resulted in judgment for plaintiff for \$2,046.80 against the Missouri, Kansas & Texas Ry. Co., and against plaintiff in favor of the Gulf & Interstate Ry. Co. On appeal judgment was *affirmed*. Opinion by NEILL, J., who set out the findings of the trial judge, and reviewed the several assignments of error. Among the points decided were the following:

"If a common carrier undertake to carry perishable property in cars specially adapted to preserve it, he will become responsible for any defect in the cars resulting in the injury of the property. And under modern methods in the case of carriers by rail, the duty of a carrier, where he accepts perishable property for transportation, to provide suitable cars, extends to proper refrigeration according to established custom. *Johnson v. Ry. Co.*, 133 Mich. 596, 95 N. W. 724; *Railway Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444. The facts that the cabbages had just been cut from their stalks, were sound, firm, and hard when shipped, and decayed in transit, and badly damaged when they reached their destination, are *circumstantial* evidence in finding, at least, the cars were either not properly constructed for the carriage of such goods, or that they were not properly refrigerated. These circumstances were of themselves sufficient to warrant the court in finding, at least, the cars were either not properly constructed or refrigerated. A finding of either would be sufficient to render appellant liable for the damage to the produce.

"Although a shipper may discover before loading of the departure of

the car that it is not suitable for carrying cabbages, or other like perishable goods, he will not on that account be deemed guilty of contributory negligence, or of having assumed such risk, where he has no means or opportunity of relieving himself of the situation. In a case like this, where the cabbages had been purchased and gathered by the shipper from various farms in view of immediate shipment on cars the defendants had agreed to furnish suitable for the purpose, the shippers, even though they may have known the cars were not of the proper kind or iced as required, had either to ship them at the risk of their decaying in transit, or to let them lay and rot at the place where they were carried for shipment; for, as they had no means of preserving them, the cabbages would certainly decay if they were not shipped. This condition of things was brought about by the railroad's breach of its obligation to furnish suitable cars properly refrigerated. And it, rather than plaintiff, should be held liable for the damages consequent on loading the goods upon the cars it furnished for that purpose." * * *

"The ninth assignment is based upon the erroneous assumption that the court based its judgment on the market price of the goods at the point of origin of the shipment, and not for the market value of the goods at destination had they not been damaged by defendant's negligence. Though the judgment may have been for what the goods were worth at the point of origin, yet, as the finding of the trial court shows that they would have been worth at least that much, and probably more, on the market at destination had they arrived there in the condition they would have been in but for defendant's negligence, the defendant has no ground to complain of the amount of damages awarded"

On rehearing, April 7, 1909, the court said:

"In this motion it is urged that we erred in not sustaining appellee's cross assignment of error, which complains of the trial court's second conclusion of law.

"The variance consisted in this: that the allegations charged that the damage was caused from delay in transportation while, according to the court's finding of fact, there was no such delay — four or five days being a reasonable time for transportation to destination, the shipment having arrived there within that time — consequently no damage could accrue from the alleged cause; but it arose from defendant's failure to keep the car properly refrigerated which was not alleged. Therefore, the motion is overruled."

McLEAN v. GULF & INTERSTATE RAILWAY COMPANY OF TEXAS ET AL., (*Texas Civil Appeals*, March, 1909) 118 S. W. 578, was an action against the Gulf & Interstate Ry. Co. and the Kansas City Southern Ry. Co., to recover as damages the value of two cars of cabbages shipped over the railways of defendants. From a judgment of the District Court, Jefferson county, rendered by the court without a jury in favor of defendants, plaintiff appealed, and judgment was *reversed* and rendered in part. The syllabus to the report of the case in 118 S. W. Rep., states the case as follows:

"A car of cabbage was loaded by ten o'clock A. M. March 15, 1907, and defendant carrier immediately notified. Defendant permitted the car to stand on the siding without refrigeration until the night of the 16th, and the car was not then iced until the morning of the 17th, when it was found

that the cabbage had already begun to deteriorate. On arrival at destination, the cabbage was a total loss. Ninety-five per cent. of all shipments of perishable produce were carried by defendant on its passenger trains, and the car in question could have been shipped on a passenger train which went north at six o'clock on March 15th but for defendant's rule against carrying more than one freight car at a time on its passenger train, and that a tank car was being carried on the train in question. *Held*, that such rule was no defense for defendant's failure to sooner move and refrigerate the shipment, under its obligation to transport perishable property with reasonable dispatch."

The opinion was rendered by McMEANS, J., who, after setting out the findings of the court below and reviewing the evidence, rendered judgment as follows:

"The judgment in favor of the Kansas City Southern Railway Company is *affirmed*; and, this court here proceeding to render such judgment against the Gulf & Interstate Railway Company of Texas as should have been rendered by the court below, it is ordered and adjudged that the plaintiff Marrs McLean do have and recover of and from the defendant Gulf & Interstate Railway Company of Texas the sum of \$405.75, with six per cent. interest per annum thereon from the 15th day of March, 1907, and all costs of suit, except the costs incurred by reason of the Kansas City Southern Railway Company having been made a party to this suit, which costs are adjudged against the plaintiff, for all which execution may issue."

Rehearing denied, April 8, 1909.

Apples damaged — Refrigerator car not properly ventilated — Carrier liable.

In *ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS v. A. A. JACKSON & Co.*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 853, judgment for plaintiff for \$202.50, with interest in the Dallas County Court, was *affirmed*. The action was for damages to a car load of apples, caused by alleged negligence of defendant in permitting the refrigerator car to become heated by reason of ventilators being closed on the part of the journey over defendant's road. The apples were properly shipped and packed in a refrigerator car, but the damage was occasioned during the trip over defendant's road, the last connecting carrier. Opinion by BOOKHOUT, J.

Loss of part of goods from case of furs — Bill of lading — Valuation — Damages.

In *WINDMILLER v. NORTHERN PACIFIC RY. CO.*, (*Washington*, April, 1909) 101 Pac. 225, plaintiff appealed from a judgment in his favor in the Superior Court, King county, but the same was *affirmed*. The case is stated in the opinion by DUNBAR, J., as follows:

"On May 10, 1905, appellant shipped from Seattle, over respondent's railroad and connecting lines, a case of furs, of the real value, as appellant contends, of \$3,111. Upon delivery to the carrier the value was stated by appellant at \$3,000. The freight demanded was something over thirty dollars. Appellant, deeming this unreasonable, remonstrated, and the respondent offered to carry the goods to New York for \$5.05 if appellant

would release the value to one dollar per pound. Appellant elected to do this, and a bill of lading was issued, upon which was written the stated value \$3,000, and the words 'release to value one dollar per pound.' When the case arrived at New York and was about to be delivered, it was discovered that it had been tampered with. Thereupon the case was opened, in the presence of the agent's last connecting carrier and the representatives of the consignee, and it was found that the furs to the value of \$1,920, as appellant claims, had been abstracted, and in their place there had been substituted nineteen copies of Everybody's Magazine. The case with the magazines weighed at New York 160 pounds, and without the magazines 137 pounds. Upon the respondent's waybill the weight was stated at 120 pounds. Respondent made no explanation at the time of the discovery of the loss or afterwards as to the cause or manner of the loss. The appellant was the owner of the goods at the time of their shipment and during transportation. The respondent in transporting the furs delivered the same to its connecting carrier, Minnesota Transfer, at St. Paul, and the connecting carrier noted no exception as to the condition of the case. The respondent's regular tariff for carrying dry skins, such as those involved in this action, provides for the addition to the rate, based on the value of one dollar per pound, of $1\frac{1}{4}$ per cent. of the additional valuation, unless the shipper releases the value of the goods to one dollar per pound. This is appellant's statement of the case, and is in substantial accord with the findings of the court. The appellant sued respondent, claiming compensation for the actual value of the goods lost. The case was tried by the court without a jury, and, after findings of fact, the conclusion of law announced was that the appellant was entitled to recover on account of the loss of furs referred to in the findings of fact and of the estimated weight of fifty pounds in the sum of fifty dollars and the costs of suit. From this judgment this appeal is taken.

"There is no contention on the part of the respondent that the company was not responsible for the amount found by the court, viz., one dollar per pound for the goods that were lost, and, while the discussion in the appellant's brief takes a somewhat broad range, there is really only one question involved in the case, viz.: Is appellant entitled to recover the actual value of his goods lost, or only the released value of one dollar per pound? It is the contention of the appellant in this case that it plainly appears from the testimony that the furs were lost by theft, and that the only reasonable inference of fact is that the theft was by some one in the employ of one of the respondent's connecting carriers and that under such circumstances the appellant is not bound by the contract which he made with the carrier. Appellant cites *Allen v. Canadian Pacific Ry. Co.*, 42 Wash. 64, 84 Pac. 620, to sustain the rule that under the law of this State, an initial carrier is responsible for the acts of the connecting carriers and their servants. While that doubtless is the rule, the responsibility of the carrier is confined to his contract. It may be conceded that it is the law of this State that the respondent's liability extends to the acts of the connecting carriers; but, conceding this, there still remains the vital question of what the responsibility is under the contract. This case, it seems to us, falls squarely within the rule announced by this court in *Hill v. Northern Pacific Ry. Co.*, 33

Wash. 697, 74 Pac. 1054, where it was held that where a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight it receives, and of protecting itself against extravagant and fanciful valuations. This case was based upon the case of *Hart v. Penn. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, where the same doctrine was announced. That case involved a shipment of horses. A contract was made with the railroad company releasing valuation to a certain value. During the transit one of the horses was killed and others were injured, and suit was brought for the full alleged value of the horses; and the court held that the shipper would be bound by the conditions of his contract." * * *

NILSON v. OAKLAND TRACTION COMPANY.

Court of Appeals, Third District, California, February, 1909.

CARRIER OF PASSENGERS—BOARDING STREET CAR—

PLEADING.—In an action for damages for injuries sustained by plaintiff while boarding a street car operated by defendant, the complaint, while not expressly alleging that the car was started suddenly through the agency of defendant's servants, sufficiently alleged their participation in the accident where it was averred that the car "was in the charge and under the management and control of the motorman and conductor" (1).

PLEADING—SUFFICIENCY OF COMPLAINT—SIGNAL.—

Where plaintiff alleged that he was standing at a street corner where it was usual for defendant's street cars to take on passengers, and that as a street car approached he signaled the motorman to stop, whereupon the car slowed up "until the same had come very nearly to a standstill and plaintiff was in full view of said motorman and conductor when he so signaled said car to stop," the complaint sufficiently alleged that the motorman saw the plaintiff and understood the signal, the meaning of the word "signal" being "to communicate by means of an understood sign" (2).

1. *Boarding street cars, trains, etc.*
See Notes of Cases, at end of the case at bar, relating to "boarding accidents."

See also the AMERICAN NEGLIGENCE DIGEST (1909 edition) for actions arising out of accidents while boarding trains, street cars, etc., from 1897 to 1907, where the cases reported in in Vols. 1-20, AM. NEG. REP., are col-

lated, under titles, BOARDING, CARRIER OF PASSENGERS, etc.

See also Vols. 2-7, AM. NEG. CAS. for cases from earliest period to 1896.

2. See the AMERICAN NEGLIGENCE DIGEST (1909 edition) for cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) under titles, ALIGHTING; BOARDING; CARRIER OF PASSENGERS; SIGNALS, etc.

SIGNAL TO STOP CAR — "SLOWING UP" — CARRIER AND PASSENGER. — Where plaintiff was at a regular stopping place for street cars and signaled the motorman of an approaching car to stop in order that he might take passage on the car, and in response to the signal the car was brought virtually to a standstill and plaintiff was in the act of boarding the car, the relation of passenger and carrier arose between the parties.

CARRIER OF PASSENGERS — DEGREE OF CARE. — A carrier of passengers must use the highest degree of care in transportation of passengers, and if injury results in consequence of the failure to exercise such care, the carrier is liable therefor.

PASSENGER INJURED WHILE BOARDING STREET CAR — STARTING OF CAR. — Where a street car, which had practically stopped in response to a signal from plaintiff was started suddenly without warning, and plaintiff was injured thereby, the defendant company was negligent, and it was not relieved because the conductor of the car may not have known of plaintiff's position, it being the conductor's duty to have informed himself thereof.

PASSENGER INJURED — PRESUMPTION OF NEGLIGENCE — BURDEN OF PROOF. — Where a person is injured while being carried as a passenger, it is only necessary to allege the injury and that it was caused by the act of the carrier, as in such a case there is a presumption of negligence, the burden being upon the carrier to show that the injury was sustained without negligence on its part.

BOARDING SLOWLY MOVING STREET CAR NOT NEGLIGENCE PER SE. — It is not negligence *per se* for a person to attempt to board a slowly moving car after he had signaled the motorman to stop.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In such a case it was for the jury to determine from the evidence whether plaintiff was guilty of contributory negligence.

APPEAL from Superior Court, Alameda County.

ACTION by August N. Nilson against the Oakland Traction Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. The facts appear in the opinion. *Judgment affirmed.*

HARMON BELL, for appellant.

C. W. EASTIN, for respondent.

BURNETT, J. — Defendant appeals from the judgment for \$2,500 in favor of plaintiff and from the order denying its motion for a new trial. The action was for the damages in consequence of personal injuries caused by the negligent act of defendant in starting its street car suddenly forward whereby plaintiff, who was about to board it, was thrown violently to the ground.

The allegations of the verified complaint material to the inquiry here are as follows: "That from a time prior to the 6th day of

September, 1905, continuously thenceforward until after said day, said defendant owned, controlled, operated, and maintained a system of street railroads in, along, and upon the public streets, within the corporate limits of the city of Oakland in said county of Alameda. That on the 6th day of September, 1905, and at the time of the injury to plaintiff herein alleged, said defendant was so operating and maintaining a line of street cars in, along, and upon Broadway street, in said city of Oakland, which cars were operated and propelled by electricity and each of which cars was in the charge and under the management and control of two servants or agents of the defendant, known as and called, respectively a 'motorman' and a 'conductor.' That on said 6th day of September, 1905, it was the custom of said defendant, by and through its said servants and agents, to stop each of said cars at the corner of Ninth street and Broadway, to enable passengers to board said cars at said point. That on said day plaintiff waited at said street corner to take passage upon one of said cars of defendant, and while so waiting one of said cars approached said street corner in the usual manner, whereupon plaintiff stepped towards said car and signaled the motorman standing in the front of said car to stop, whereupon said car slowed up until the same had come very nearly to a standstill, whereupon plaintiff took hold of the stanchion or support upon the side of said car for the purpose of boarding the same, and was in the act of boarding the same, whereupon, but before plaintiff could obtain a footing upon said car sufficiently to enable him to board the same and maintain his place upon said car, said car was started suddenly forward with great speed and without warning to plaintiff. That the forward movement of said car was so sudden and unexpected and so rapid that plaintiff was unable with safety to relax his hold upon said support and was also so violently jerked as to prevent him from getting upon said car, and that while so holding said support and in said situation plaintiff was dragged for a considerable distance, and until he was unable longer to maintain his hold upon said car, when he was thrown violently to the ground, and said car continued along said Broadway at a rapid rate of speed, leaving plaintiff where he fell. That at said time no other persons then the motorman and the conductor were upon said car. That said conductor was standing apparently talking to the motorman in the front end of said car, and plaintiff was in full view of said motorman and conductor when he signaled said car to stop as aforesaid." The general demurrer was interposed and overruled by consent. The answer denied any negligence of or by defendant and set up contributory negligence on the part of plaintiff.

Appellant presents a summary of its contentions as follows: "1. The complaint, on which the verdict is founded, does not state facts sufficient to constitute a cause of action. 2. The instructions involving the question whether the car had come to a stop or not were not justified by the evidence. 3. The giving of the instructions involving the doctrine of last chance was not warranted by the evidence. 4. Plaintiff's own evidence shows that he was guilty of contributory negligence." The objection to the complaint is stated in general terms as follows: "An examination fails to disclose any allegation charging any wrongful act on the part of the defendant or its servants — in fact, it utterly fails to in any way connect the injury suffered by plaintiff with any culpable or negligent act of defendant or its servants." The particular specifications are that there is an omission to allege that the car was started by defendant, or that defendant had knowledge that plaintiff desired to board said car.

It is argued that, "in order to properly set forth a cause of action founded on negligence, it is necessary to allege that the acts were done in a negligent manner, unless the doing of the acts themselves necessarily excludes any hypothesis other than that of negligence." In this connection the following citations are made: "It is true that in certain cases where the facts stated do not constitute a cause of action unless done negligently, it must be averred that they were so done, unless the facts themselves necessarily exclude any hypothesis other than that of negligence." *Silvera v. Iverson*, 125 Cal. 269, 57 Pac. 996. The term "negligence" for the purpose of pleading is a fact to be pleaded — an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act and makes it a legal wrong." *Stephenson v. So. Pac. Co.*, 102 Cal. 147, 34 Pac. 618, 36 Pac. 407. The rule is stated with substantial accuracy in the foregoing although it is to be observed that the declaration from the *Silvera* Case is unnecessary to the decision, and it applies the strict rule in relation to the exclusion of any hypothesis other than that of negligence only to "certain cases." However, in said case it was held that the complaint was sufficient in the absence of a special demurrer; the court saying that "From the averred relation of the parties it was the duty of appellants, as averred, to supply a good reefing pennant, and not having done so, and by reason thereof the respondent having been injured, the appellants were liable for damages whether the wrongful act was the result of negligence, or inattention or other cause." In the *Stephenson* Case, *supra*, also it

is further declared — which is indeed, apodictic — that: “The absence of care in doing an act which produces injury to another is actionable. The term ‘negligence’ signifies and stands for the absence of care.” Although it may be conceded that the complaint before us is somewhat inartificial and defective in the respects indicated, still we think it does appear therein that the defendant was responsible for the act causing the injury to plaintiff, and that said act was the result of inattention and want of care on its part. While there is no express allegation that the car was started suddenly through the agency of defendant’s servants, this conclusion is necessarily implied in the language used. It is averred, as we have seen, that the car “was in the charge and under the management and control of the motorman and conductor.” If it was under their management and control, its movements were not and could not be without their direction. Hence their participation in the accident is sufficiently alleged.

Again, when it is alleged that plaintiff standing at a street corner where it was usual for the car to take on passengers, signaled the motorman to stop, whereupon said car slowed up “until the same had come very nearly to a standstill and plaintiff was in full view of said motorman and conductor when he so signaled said car to stop,” it is impossible for any one with ordinary understanding to misconceive the purpose of the pleader to convey the idea that the said change in the movement of the car was in response to the signal of the plaintiff and with a view of accepting him as a passenger. It is equally impossible for any one to have any doubt that the motorman saw the plaintiff and understood the signal. This follows from the meaning of the word “signal,” which is “to communicate by means of an understood sign.” If the motorman was in full view of and was signaled by the plaintiff, he must have seen the latter.

But if it should be held that the complaint is defective in this respect, the omission should be deemed supplied by the denial of the answer that “the car slowed up at all in response to any signal by plaintiff at any time and place.” The issue was thus clearly made as to whether defendant’s servant acted in pursuance of the signal of plaintiff. Indeed, the case was tried upon the theory that there was nothing lacking in the complaint to show that agency of the defendant in stopping the car in response to plaintiff’s invitation and for the purpose of accepting him as a passenger. Evidence addressed to these considerations was received without opposition, and it is now too late for defendant to maintain an objection to what

we hold to be at most a defective attempt rather than an entire failure to allege a material fact. By clear intendment and reasonable construction we find in the complaint a case presented therefore of the plaintiff at the place where he should be signaling the motor-man of a regular passenger car to stop in order that said plaintiff may take passage. In response to the signal, the car is brought virtually to a standstill, and the plaintiff is in the act of boarding the same. There is thus revealed the relation of carrier and passenger and the corresponding obligations growing out of this relation.

The rule seems to be well settled, as stated by Hutchinson on Carriers, § 1005: "That a person may become a passenger without having come into the carrier's vehicle, if the surrounding circumstances show an intent on his part to become a passenger and an acceptance of him by the carrier as a passenger." The text is illustrated by reference to a case where a man was hurt by the starting of an omnibus just as he was putting his foot on the step; the driver supposing that he had entered. It follows therefore from the facts alleged that plaintiff was entitled to the same care as the law requires on behalf of passengers. This is the highest degree of care in their transportation, and if injury results to the passenger in consequence of the failure of the carrier to exercise such care, an action for damages will lie. *Osgood v. Los Angeles, etc., Ry. Co.*, 137 Cal. 280, 70 Pac. 169; *Cody v. Market St. Ry. Co.*, 148 Cal. 90, 82 Pac. 666.

Going one step further, we find the allegation that the car was started suddenly forward without warning to plaintiff. This is obviously a violation of the duty owed by defendant to plaintiff considering the latter's position at the time. It is no answer to say that it does not appear that the conductor had knowledge of plaintiff's position, as under the facts alleged it was his duty to have that information and it is implied as a matter of law. In *McCurrie v. So. Pac. Co.*, 122 Cal. 558, 55 Pac. 324, it is held that: "A *prima facie* case is established when the plaintiff shows that he was injured while being carried as a passenger by the defendant, and that the injury was caused by the act of the carrier in operating the instrumentality employed in his business. In such case there is a presumption of negligence, which throws upon the carrier the burden of showing that the injury was sustained without negligence on his part." If a case is made out by showing those facts, it must be sufficient in a complaint to allege them, as it appears has been done here.

The court committed no error in giving the following instruction:

"When a man signals a street car, at a place where such cars stop with or without signal to take on passengers, for the purpose of stopping it so he can board it and become a passenger, and the car stops or slows up as if intending to stop at that point in answer to the signal, and the man steps forward to the car, in plain view of those in charge of the operation of the car for the purpose of boarding the car, it then becomes the duty of those in charge of the car to ascertain and know whether or not he has safely boarded the car, or is in the act of boarding it, and it is negligence for them to suddenly start the car forward without warning, while he is in the act of boarding the car." The legal proposition involved in the foregoing is not disputed by appellant, but it is contended "that there was no evidence at the trial to the effect that the car had come to a stop," and therefore the instruction was prejudicial for the reason that the jury would be less likely to find plaintiff guilty of contributory negligence for attempting to board a car that had stopped than if it were in motion, and cases are cited to the effect that "the giving of an instruction not supported by the evidence is sufficient ground for reversal when it appears that such instruction misled, or might have misled, the jury to the prejudice of the party complaining." But the plaintiff testified: "And finally when the rear end of the car came, it was moving so slow that I couldn't perceive whether it was moving or not or else standing still for a moment, while I took hold of it with my hand." Mr. Nichols, a witness for plaintiff, testified that: "I can't say positively that it stopped. It is absolutely impossible for me to tell whether it was stopped, but it was going so slow that it was practically at a standstill." The foregoing is amply sufficient to justify the instruction based upon the hypothesis that the car had stopped. It did not invade the province of the jury, but presented the law applicable to a certain contingency, which, in view of the evidence, might be found to exist.

Nor was there any substantial departure from the case made by the pleadings. It is true that it was not alleged that the car had come to a stop, but it is averred that "it had come very nearly to a standstill." Even conceding that the hypothesis in said instruction goes beyond the allegation of the complaint, it finds support in the evidence, and the case was tried upon the theory that said evidence was within the issues of the pleadings, and it should not now be held otherwise. If it had been deemed of sufficient importance to call to the attention of the trial court a simple amendment to the complaint, no doubt would have been allowed, and it would have obviated the said technical criticism.

The following instruction is also criticised by the appellant: "No more in law than in morals can one wrong be justified by another. A person is bound to conduct himself with reasonable care and prudence toward even a wrongdoer, and if he can so conduct himself, and does not, he is liable, if injury is sustained by the other. Even if there was negligence on the part of the plaintiff in some degree, yet if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, and if the defendant was aware of that fact, then defendant is liable to the plaintiff for injuries so committed." It is claimed that this is subject to the criticism made in *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 20, 84 Pac. 420, wherein it is said: "The case therefore was tried upon the theory that there was evidence to bring it within the cases which hold that, although the person injured put himself by his own negligence in a place of danger, if the employee in charge of the train discovered his danger in time to prevent injury by the exercise of ordinary care and did not do so, then, notwithstanding the contributory negligence of the injured person, he may recover; but there was no such evidence in the case. There is no pretense that the motorman saw the plaintiff at all at the time of the accident until after it had occurred; on the other hand, it is shown clearly that he did not." There is evidence in the case at bar, however, from which the jury might have drawn the conclusion that plaintiff was seen by the motorman from the time he stepped out to signal the car until he was thrown down. Of course, no one except the motorman himself, who was not called as a witness, could testify positively as to this fact; but the circumstantial evidence was sufficient to justify this inference. If there was any showing of the existence of the "last chance" to avoid the accident, then the giving of the instruction was not erroneous. Other instructions are criticised on the same ground, but the objection is equally untenable.

As to the question of contributory negligence, it was for the jury to determine. It cannot be said as a matter of law that by reason of his own negligence plaintiff is precluded from recovering. Even if the car was moving slowly, it was not negligence *per se* to attempt to board it. It is a matter of common knowledge that this very thing is done hundreds of times daily in our large cities, and whether the act involves any peril or want of care must depend upon the particular circumstances of each case. Among the instructions which fully and correctly covered every phase of the evidence is the following upon this branch of the case: "Everyday observa-

tion and experience show that it is not necessarily negligent to attempt to board a moving street car. Whether it is or not depends upon the circumstances of each case. While it might be negligence for a man to try to board a car running very rapidly, it might not be negligence to try to board the same car running very slowly. It might be negligence to try to board a moving car of one kind, but not so to try to board a moving car of a different kind. It might be negligence for one man to try to board a car moving at a given rate, but not so for another man to try to board the same car, at the same place, in the same manner, and moving at the same rate. You are the judges of the question whether it was negligence for Nilson to try to board the car in question in this case, and for that purpose are to take into consideration all the evidence in the case and all the circumstances surrounding him at that time."

We find no prejudicial error in the record, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

NOTES OF CASES ARISING OUT OF INJURIES TO PERSONS WHILE BOARDING STREET CARS AND TRAINS.

In connection with *NILSON v. OAKLAND TRACTION CO.* (Cal., 1909) 101 Pac. 413, 21 AM. NEG. REP. 566 (preceding case reported herein) see the following cases:

Boarding street cars.

Passenger leaving car at a stopping place injured while attempting to board it again — Carrier liable.

In *BIRMINGHAM RAILWAY, LIGHT & POWER CO. v. JUNG*, (*Alabama*, April, 1909) 49 So. Rep. 434, appeal from judgment for plaintiff for \$2,925 in the City Court of Birmingham in an action for loss of leg sustained while boarding a car of defendant railway, judgment was *affirmed*. The opinion was rendered by McCLELLAN, J., who stated the alleged cause of the injury as follows:

"The plaintiff took passage on the interurban cars of the defendant from Bessemer to Birmingham. These cars traversed a distance of about fifteen miles between the two cities, but were without closets for the convenience of passengers. The plaintiff, who was the only witness testifying to the circumstances of the injury itself, thus described it: 'The car was stopped there; had stopped at the time he got off; went to get back on the car, and had one foot on the steps and one foot on the ground, and his hand on the car handle, and the bell rung, and the car run, and the last car caught his leg, the colored people's car. He was riding in the first car. He tried to catch the first car, and the last car caught his leg. He tried to get on the back end of the first car.' The conductor tes-

tified that he knew nothing of the plaintiff's desire or intention to leave the car, nor of his leaving it, nor that he knew anything of the injury until some time afterwards. There was testimony for the plaintiff tending to corroborate him in the respect that he sought and secured the consent of the conductor to leave the then stationary car to urinate."

* * *

The court reviewed the various questions at issue and held that there was no error in the record, and affirmed the judgment for plaintiff. *Rehearing denied*, May 11, 1909.

Passenger injured while attempting to board car—Alleged failure to signal—Insufficiency of complaint.

In *COBE v. MALLOY*, (*Indiana App., Division No. 1*, June, 1909) 88 N. E. 620, action by Catherine Malloy against Ira M. Cobe, Receiver of Calumet Electric St. Ry. Co., for damages for injuries alleged to have been sustained by plaintiff while boarding defendant's street car, judgment for plaintiff in the Superior Court, Lake county, was *reversed* on the ground that the complaint did not state a cause of action. The court (per MYERS, J.) said:

"Turning to the complaint, it will be seen that the only facts appearing in the complaint to show actionable negligence on the part of appellant are stated in the language following: 'That, while plaintiff was attempting to go upon another street car of the said defendant and to take passage for hire thereon, said plaintiff attempted to cross the street in front of one of defendants' cars while said car was standing still at the time said plaintiff attempted to cross said street in front thereof; that said car was started by defendant without ringing the bell or sounding the gong, and without any other notice or warning, and while plaintiff was in front of and near to said car, and then and there and thereby run into and struck plaintiff with great force and violence, and thereby threw plaintiff with great violence upon the street,' etc., describing her injuries."

After citing authorities as to what is necessary in pleading negligence, the court said:

"In the complaint before us there is not a single act done or act omitted to be done by appellant characterized as having been negligently done or negligently omitted to be done, nor do the facts alleged demand the conclusion that appellant was negligent in starting the car without first ringing the bell or sounding the gong. It is not even stated that the motorman in charge of the car could have avoided the accident by ringing the bell or sounding the gong. *Evansville, etc., R. Co. v. Krapf*, 143 Ind. 647, 652, 36 N. E. 901. Whether the car was started slowly or rapidly is not shown, nor does it appear that a prudent person or persons in charge of the car by the exercise of ordinary care should have known that the starting of the car would likely endanger persons on the street, nor that the motorman knew or could have known by the exercise of reasonable and ordinary care that appellee was going to attempt to cross the track, or that she would step upon the track in front of the car, or that he knew she was upon the track or would attempt to go upon the track when starting the car, nor does it negative knowledge on the part of the appellee that the car was about to start or would start at the time it did,

or that she did not have sufficient time and opportunity to get of the track before being struck.

"Referring to the distance between appellee and the car when it was started, the complaint designates it by the words 'near to.' These words are too indefinite. The distance between the appellee and the car when started fixed by the words 'near to' is not sufficiently certain to warrant this court in saying as a matter of law that the starting of the car was for that reason necessarily negligent." (Citing authorities.)

"Starting the car without ringing the bell or sounding the gong or otherwise giving notice or warning, in the absence of a statute or ordinance requiring such signal or notice of warning to be given, might or might not constitute actionable negligence, depending on the facts associated therewith. It is not claimed that the car was started in violation of any statute or ordinance, nor do we find in the complaint facts, taken in connection with the fact of starting the car, showing that it was the fault of appellant which caused the injury for which damages are claimed. The complaint did not state a cause of action." (Citing authorities.)

Passenger entering side door injured by door of car — Signal — Contributory negligence.

In *BENTSON v. BOSTON ELEVATED RY. CO.*, (*Massachusetts*, May, 1909) 88 N. E. 437, two actions by parent and child for injuries sustained while entering the side door of one of defendant's cars, verdicts for defendant in both cases in the Superior Court, Suffolk county, were sustained and plaintiff's exceptions overruled. HAMMOND, J., rendered the opinion in the course of which he said: "While the plaintiff in the first case with her child was in the act of entering the side door of one of the defendant's cars, the door in shutting struck her leg and injured her." After setting out plaintiff's testimony, the court said:

"The plaintiff was familiar with the method of working the car doors; she attempted to enter a car which she knew was liable to be closed at a given signal, by a man standing where he could not see her to warn her after it had begun to close; and she attempted to do this without paying any attention to whether the signal had been given or to notice whether the door had begun to close before she began to step on the car. It is plain that the door had begun to close before she began to enter, and that if she had paid the least attention to the movements of the door she would have seen that movement. On this question of the due care of the plaintiff the case is materially different from *McGarry v. Boston Elev. Ry.* 195 Mass. 538, 81 N. E. 194, *Kelly v. Boston Elev. Ry.*, 197 Mass. 420, 83 N. E. 865, and cases there cited, and *Hilborn v. Boston & Northern St. Ry.*, 191 Mass. 14, 77 N. E. 646." * * *

Compare the *BENTSON* case with the *RYAN* case (next paragraph).

Passenger injured by sudden start of car while boarding same — Signal — Carrier liable.

In *RYAN v. PITTSFIELD ELECTRIC ST. RY. CO.*, (*Massachusetts*, October, 1909) 89 N. E. 527, verdict for plaintiff in the Superior Court, Berkshire county, in an action of tort for medical attendance, medicines, and personal

injuries sustained by her while boarding one of defendant's cars, was sustained, and defendant's exceptions overruled. SHELDON, J., delivered the opinion in the course of which he said:

"The first instruction requested by the defendant was that on the evidence the plaintiff was not entitled to recover. Manifestly this could not have been given. There was evidence that the plaintiff and her sister, standing at a proper place, signaled the defendant's car to stop and receive them as passengers; that the motorman saw them waiting for the car, must have seen their signal, and stopped the car accordingly; that while the plaintiff was in the act of getting on the car the conductor gave the signal to start the car, it started, and the plaintiff was thrown down and injured. The jury properly could find that the plaintiff was in the exercise of due care, and that the conductor was negligent in causing the car to be started before she had had opportunity to get fully upon the car. The conductor himself testified that when he gave the signal to start the car he was standing on the front end of the car where he could not see whether anybody was trying to get upon it at the side where the plaintiff was, and that passengers at this point were accustomed to get upon either side of the car indifferently." * * *

"This case is unlike *Bentson v. Boston Elev. Ry.*, 202 Mass. 377, 88 N. E. 437. It was for the jury to determine what the existing circumstances were and whether in view of those circumstances the plaintiff acted with proper regard to her own safety. This was the effect of the instructions given."

See the *BENTSON* case, (preceding case reported herein).

Passenger injured boarding car — Sudden start or jerk of car — Carrier liable.

In *PAYNE v. SPRINGFIELD STREET RY. CO.*, (*Massachusetts*, October, 1909) 89 N. E. 536, two actions by husband and wife for injuries sustained by the wife while trying to board defendant's car, verdicts for plaintiffs in the Superior Court, Hampden county, were sustained, and defendant's exceptions overruled. LORING, J., delivered the opinion, and stated the case as follows:

"The plaintiff's case was that as the car in question approached a white post on Main street in Springfield, where she with a companion was waiting for a car, she stepped into the street and signaled to the motorman by putting up her hand; that 'she saw the motorman look right down at her like that (indicating) and shake his head;' that after that the car slowed down and stopped; that when it stopped the rear of it was ten or twelve feet beyond the white post; that she and her companion followed up behind, walking diagonally across the street; that she undertook to get on board and for this purpose put both feet on the step, and after putting her bundles on the floor of the vestibule, with both hands on the grab irons was in the act of raising her left foot from the step to the floor of the vestibule, when the car started with a jerk, and threw her back into the street. Evidence was introduced in her behalf that she was unconscious until she got nearly to her house; that she lost four or five teeth, and as a result of the accident was paralyzed on the right side and 'had lost the sense of smell, taste, sight and hearing.'

"The defendant's case was that the plaintiff did not signal the car by

"A verdict was ordered for the defendant in both actions at the conclusion of the plaintiff's case. The plaintiff's case consisted of a statement of the plaintiff's intestate and the testimony of one eyewitness.

"The statement of the plaintiff's intestate was that he was stepping on the car; that he put his feet on the car when the conductor rang the bell and the jerk of the car threw him on his back.

"The testimony of the eyewitness was that the car had stopped, or had almost stopped, at the further side of Windsor street, at the crossing where the car would stop, meaning where the car would stop for passengers. He further testified that the intestate put his left hand on the handle and his left foot on the step, and was reaching with his right hand when the conductor rang the bell for the car to start; that it started off at a fast speed with a jerk, and the plaintiff's intestate was thrown off backward. He also testified that the conductor was in the middle of the car, facing the rear, and that there were eight or ten people in the car at the time.

"The eyewitness heard no bell rung for the car to stop at Windsor street. But that is not decisive. If a street car stops, or even comes almost to a stop, at the usual place where it stops to take up passengers, an invitation is extended to become a passenger. The car had not wholly stopped in *Block v Worcester*, 186 Mass. 526, 72 N. E. 77, and yet it was assumed that the jury could have found that the plaintiff had become a passenger. See 186 Mass. 528, 72 N. E. 77. The same conclusion was reached in *Lockwood v. Boston Elev. Ry.*, 200 Mass. 537, 542, 544, 86 N. E. 934. The plaintiff had a right to go to the jury on the question whether he had become a passenger on the principles stated in *Webster v. Fitchburg R. R.*, 161 Mass. 298, 37 N. E. 165, applied in *Gordon v. West End St. Ry.*, 175 Mass. 181, 55 N. E. 990, 7 Am. Neg. Rep. 367, and in *Davey v. Greenfield & Turner's Falls Street Ry.*, 177 Mass. 106, 58 N. E. 172, 8 Am. Neg. Rep. 645. See, also, *Hogner v. Boston Elev. Ry.*, 198 Mass. 260, 84 N. E. 464; *Lockwood v. Boston Elev. Ry.*, 200 Mass. 537, 86 N. E. 934.

"We are, however, of opinion that the jury were not warranted in finding that the conductor was guilty of gross negligence, and for that reason the presiding judge was right in ordering a verdict for the defendant in the first action.

"The plaintiff cites *Gordon v. West End St. Ry.*, 175 Mass. 181, 55 N. E. 990, 7 Am. Neg. Rep. 367, as a decision that on this evidence the jury were warranted in finding gross negligence on the part of the conductor. But in that case the plaintiff's intestate was a feeble old man, seventy-four years of age, while the plaintiff's intestate in the case at bar was a strong, healthy young man about eighteen or nineteen years of age.

"The exceptions in the first action must be overruled, and those in the second action sustained."

(H. T. RICHARDSON appeared for plaintiff; HUGH D. McLELLAN, for defendant.)

Passenger falling from running board while boarding car — Carrier liable.

In *HULL v. DETROIT UNITED RAILWAY*, (*Michigan*, December, 1909) 123 N. W. 571, action for damages for injuries sustained by plaintiff, a man seventy-six years of age, while boarding one of defendant's street cars, being

thrown off the running board, judgment for plaintiff for \$1,500 in the Circuit Court, Wayne county, was *affirmed*. The important point turned on the question whether injury to plaintiff's hand causing loss of his arm was due to negligence of defendant or to contact with some Canadian thistles while plaintiff was working in a garden subsequent to his falling from defendant's car. Held, that the question of proximate cause was for the jury. Opinion by MONTGOMERY, J.

Passenger carrying grip injured while boarding car — Signal to start car — Negligence of conductor.

In *BEATTIE v. DETROIT UNITED RAILWAY*, (Michigan, September, 1909) 122 N. W. 557, the case is stated in the opinion by McALVAY, J., as follows:

"This is an action brought for personal injuries received by plaintiff on account of the claimed negligence of the conductor of a car of defendant which plaintiff was attempting to board as a passenger. He had stepped upon the first step of the rear platform, and taken hold of the rail with one hand, when the car was suddenly started and plaintiff thrown off. The jury found a verdict for defendant. Plaintiff urges that errors occurred during the trial on account of which the judgment against him should be reversed, and a new trial ordered.

"The facts in the case are that plaintiff, a salesman of teas and coffees in Detroit, went about this business carrying a heavy grip. He was about sixty-seven years old, five feet six inches in height, and weighed 258 pounds. In January, 1907, at the corner of Michigan avenue and Griswold street, in Detroit, he undertook to board a west-bound Baker street car which was standing still. He carried this grip in his right hand, took hold of the rail dividing the rear platform with his left hand, and stepped upon the lower step of the car. There was some snow on the ground that day and some on the car steps. The car conductor was standing on the rear platform waiting for plaintiff to get on, and when he got in the place and position above described, as the conductor claims, standing with both feet on the step, he signaled the motorman to start the car, which was done, and thereupon plaintiff was thrown or fell from the car step. The conductor testifies that plaintiff slipped down on the step in a sitting posture, and the car went about ten feet when he rolled off. The conductor stopped the car and went back after him, assisting him on to the car."

The court set out the testimony, and held that the conductor was guilty of negligence as matter of law. *Judgment reversed.*

Passenger boarding car injured by gates of car — Carrier liable.

In *HAWLEY v. MINNEAPOLIS STREET RY. CO.*, (Minnesota, June, 1909) 121 N. W. 627, action for damages for injuries sustained by plaintiff while boarding one of defendant's cars, judgment for \$1,100 in the District Court, Hennepin county, was *affirmed*. There was a verdict for \$1,200 but the trial court reduced it to \$1,100 because of error in receiving evidence as to special damages. ELLIOTT, J., in delivering the opinion, stated the facts as follows:

"The plaintiff's testimony tended to show that on May 28, 1907, between one and 1:30 P. M., she attempted to board one of the defendant's cars at the intersection of Plymouth avenue and Sixth Street North, in

the city of Minneapolis, Minn., and that after she had stepped upon the step of the car, and before she had time to get upon the platform, the gates were carelessly closed upon her in such a manner as to catch her foot and throw her forward upon the floor, thus injuring her foot and causing her to have a miscarriage. The accident was not reported by the conductor as required by the rules of the company, and the defense was that no such accident ever occurred. The plaintiff's evidence was sufficient to justify the jury in finding that the accident did occur as stated by the plaintiff and her witnesses. It was claimed that the conductor of the car carried the number 1,076, that the plaintiff talked with him at the time of the accident, and that he requested her not to report him, as it probably would result in his discharge. Conductor No. 1,076 was named Groff, and it was conceded that his car passed the place in question a few minutes after the time stated by the plaintiff. Groff denied positively that any such accident ever occurred on his car; but the question of credibility was for the jury. After the jurors had retired, they returned into court, and one of the jurors said: 'Your honor, the question has arisen: Is the complaint—whether we can find the time which is named in the complaint, from one to 1:30, or if we believe the accident occurred five or ten minutes before, or five or ten minutes after?' The court replied: 'You are not bound by the allegations of the complaint concerning the time when the accident happened. The important thing is to find whether it did happen, and whether it was substantially as claimed by the complaint.' It is contended that this was error, because, as the evidence then stood, the exact time had become material. The statement of the court was correct, because it made no difference whether the accident occurred a few minutes before or after 1:30 P. M., if, in fact, it did occur on Groff's car. It is true that the plaintiff had fixed the time as not later than 1:30 P. M., and that Groff had testified that his car did not pass the place until 1:41 P. M.; but the jury may have concluded that the accident happened as the plaintiff claimed, and still believed that it did not happen until 1:41 P. M." * * *

Passenger falling or thrown from car — Contributory negligence.

In *QUINN v. METROPOLITAN STREET RY. Co.*, (*Missouri Supreme*, Division No. 1, February, 1909) 118 S. W. 46, action for injuries alleged to have been sustained by plaintiff while boarding one of defendant's cars, judgment for defendant in the Circuit Court, Jackson county, was *affirmed*. The opinion by GRAVES, J., reviewed the case at length, and set out the evidence as follows:

"As to the evidence, the record shows that the plaintiff was waiting for this car, but talking to a friend, a young man from the stockyards. His witnesses say that the car stopped the usual length of time at that place. The car was a west-bound car on Ninth street, but went out on Summit street. The stopping place was the junction of Main and Delaware streets in Kansas City, too well known to the jurisprudence of this State and the reported cases to need further comment. Just how many got off of the car does not appear, but it does appear that the cars were not crowded, and that only four parties were taking passage, including the plaintiff. It does appear that one of these parties, who, like plaintiff, was there awaiting the car, did get on the coach from the rear end,

and, walking clear through the car to the front end, was in the act of seating herself when the signal to start was given. It does appear that two of the prospective passengers were a woman and her six-year-old son, who had come in on a car from another direction. This lady had some baskets of groceries, and she herself got on the car on the platform thereof. She was recognized by the other lady, who, instead of seating herself, started to open the front door of the coach for her when the car started. At that moment it was discovered that the little boy had not gotten on the car, and the mother evidently made some demonstrations. Plaintiff says that the little boy was trying to board the car after it started, and he pushed him back, fearing that he would fall under the wheels. Plaintiff finally admitted that he got both feet upon the steps of the car and was holding with both hands, when the mother of the boy, as he thought, was going to attempt to get off of the moving car. He rode in this position from the junction sidewalk and stopping place, practically half across Delaware street, and was thrown down by an accelerated forward movement of the car, if such it could be called under the evidence. Plaintiff reiterates a description of the manner of his fall several times." * * *

"That plaintiff had notice of the starting of this car before it started, he concedes. This admission eliminates that charge of negligence. The evidence for plaintiff, as before stated, shows that the car stopped the usual time. The evidence also shows that plaintiff had gotten to a reasonable place of safety before he fell. He was upon the car with both feet upon the step and both hands holding to the rails, from which he could have easily reached the platform, but for his own act later, the voluntary release of his hand-hold, and this from a cause which is not chargeable to defendant.

"Nor does the testimony show any such unusual lurch or jerk of the car as would be denominated negligence. We all know that as the grip becomes more firmly attached to the cable there will be an increase of the speed, and that cable cars are not free from lurches thus produced. There should have been some evidence upon this point showing an unusual and negligent running of this car, to say the least. It must also be borne in mind that the cable train was crossing these tracks in Delaware street, which of itself would produce some disturbance. But after all, this evidence tends to show that the accident was the result of plaintiff's own voluntary act, which act of his was superinduced by an independent cause. We do not think that plaintiff made a case on the evidence adduced by his witnesses. The defendant's evidence tended to show that he was not on the car, but fell in an attempt to place the little boy on board the moving train. We mention this to show that the evidence of defendant did not aid plaintiff's case. Our discussion has been confined to plaintiff's evidence. The woman said she was not attempting to leave the car, but was trying to stop the car so that the child might get aboard. The signal was given and the car stopped about the time it crossed Delaware street. The plaintiff and the child both boarded the car and proceeded west. No complaint was made by plaintiff at the time as to any injury or as to the treatment of him by defendant's employees." * * *

*Passenger boarding crowded car caught between two cars and injured—
Carrier liable.*

In *SCOTT v. METROPOLITAN STREET RY. CO.*, (*Missouri Appeals, Kansas City*, May, 1909) 120 S. W. 131, judgment for plaintiff in the Circuit Court, Jackson county, was *affirmed*, the facts being stated in the opinion by BROADBUSH, P. J., as follows:

"This is a suit to recover damages for injuries alleged to have been received by plaintiff through the negligence of the defendant on the 19th day of November, 1906, at about 5:30 o'clock p. m., at the intersection of Twelfth and Walnut streets in Kansas City. Twelfth street runs east and west. Walnut street runs north and south. They cross each other at right angles, and in each direction has double tracks of its electric railway. At the intersection of the two streets is a point for letting off, taking on or transferring passengers. As a precaution for safety, the cars going in any direction stop on reaching the crossing before passing over it. Prior to the time mentioned, the defendant had operated its cars on Twelfth street by cable. For the purpose of letting go the cable of the cable cars, the track had a jog or kink in it just west of Walnut street, which had the effect of lessening the distance between the two tracks, thus leaving a space between passing cars of about six inches. This jog had the effect also of causing cars to wobble so that the bumpers of passing cars sometimes struck each other. The car in use at the time we speak of was an old-fashioned car with an entrance or exit at each end, one on the outside of the track, and the other on the inside or next to the other track. The plaintiff was intending to take passage on an east-bound car on Twelfth street at said crossing, and when the car stopped on the west side of the Walnut street tracks passengers were getting off and on the car, and, seeing that the outside entrance and platform were crowded with passengers, he concluded he would go around and get on at the east end of the car between the two tracks. When he got there, he found it was also crowded with passengers. Still he succeeded in getting on to the steps and into the vestibule of the car, but passengers in their endeavor to alight crowded him out and down onto the ground. About this time a west-bound car was standing on the north track east of the crossing. Plaintiff, holding to the car, attempted to get back to his former position on the car upon the platform, but other passengers had got before him and forced him down, and he was therefore unable to get entirely back upon the platform. While he was in this position and unable to get farther into the car, the motorman on the west-bound car started it over the crossing. The plaintiff saw it when it was fifteen or twenty feet away, and, realizing his peril, motioned the motorman to stop, and other passengers, seeing plaintiff's danger, cried out to the motorman to stop; but the motorman, heedless of the warnings, if he saw or heard them, or not understanding their purport, failed to stop his car, and plaintiff was caught between the two cars and severely injured. Plaintiff was familiar with the conditions of the track at the point in issue, but at the same time he was familiar with the practice of defendant not to allow the cars to pass one another there. The plaintiff did not see the approach of the west-bound car until he was making the second effort to get upon the car. The west-bound

car was moving slowly and stopped within the distance of five or six feet after plaintiff was caught between the two cars. Plaintiff testified on cross-examination that the car he tried to board was packed, and that he saw it was impossible to get on at the rear end. After he got around to the other end of the car, notwithstanding the platform was crowded, he thought he could get on, as he saw persons getting off. There were several grounds of negligence alleged in the petition, but the issue was narrowed to the allegation of negligence on the part of defendant in maintaining its tracks in a dangerous proximity to each other. The plaintiff recovered, and defendant appealed." * * *

Rehearing denied, June 14, 1909.

Sudden start of car while passenger was boarding same — Carrier liable — Excessive damages — Remittitur.

In *WELLMAN v. METROPOLITAN STREET RY. CO.*, (Missouri Supreme, Division No. 1, March, 1909. 118 S. W. 31, judgment for plaintiff for \$7,000 in the Circuit Court, Jackson county, was *modified and affirmed*. The facts are stated in the opinion by Woodson, J., as follows:

"This suit was begun in the Circuit Court of Jackson county by the plaintiff against the defendant to recover the sum of \$15,000 damages for alleged injuries received by her, caused through the alleged negligence of defendant by prematurely starting one of its cars while she was in the act of boarding the same for the purpose of becoming a passenger thereon. The trial resulted in a verdict and judgment for the plaintiff in the sum of \$7,000. From that judgment defendant duly appealed to this court.

"The petition, omitting formal parts, upon which the case was tried, reads as follows:

"Plaintiff, for her cause of action against defendant, says that now and at all of the times hereinafter mentioned defendant was a corporation duly organized and existing according to law and engaged as a common carrier of passengers for hire, operating lines of street railway in and upon the streets of Kansas City, Mo., and vicinity. Among its said lines is and was at all of the times herein referred to a line called the "Vine Street Line," running upon Woodland avenue from a point north of Thirty-ninth street to Forty-third street, all being public streets in Kansas City, Mo. On October 30, 1904, plaintiff attempted to board one of defendant's south-bound cars on said Vine street line at Thirty-ninth street and Woodland avenue for the purpose of taking passage thereon, said car being stopped at that point for the purpose of receiving and discharging passengers. While plaintiff was in the act of getting upon said car, and while she was in a position of peril, all of which was known or by the exercise of due care should have been known to defendant, defendant negligently started said car, and plaintiff was, by the negligent starting of said car, and by the negligent act of defendant's conductor in trying to catch plaintiff as the result of said negligent starting of said car, thrown against parts of said car, and to the ground, and greatly injured. As the result of said negligence plaintiff received a severe shock to her nerves and nervous system, her legs were bruised, cut, and injured from below her knees to her ankles; her back and shoulders were bruised,

sprained, and injured; her left side was bruised and injured; there was a rupture or breaking of some part of the abdominal wall; and she received severe internal injuries, particularly in the pelvic region, causing her to have peritonitis, and causing an adhesion of parts of her uterus, ovaries, and fallopian tubes to each other and to the bowels and pelvic and abdominal walls; causing the ovaries to be enlarged and made sore, producing abscesses therein and about the fallopian tubes; causing prolapsus and retroflexion of the uterus; causing her pains in said affected parts, and in her head, back, shoulder, and legs. Said injuries are permanent, and plaintiff has suffered and will continue to suffer therefrom great bodily pain and mental anguish. By reason of said injuries plaintiff has been rendered an invalid, and she will continue to be such as long as she lives, her ability to bear children has been destroyed, and her period of life has been greatly shortened. Plaintiff has been confined to her bed, and will be further confined to her bed, as the result of said injuries. When plaintiff is able to get about she is only able to do so with great difficulty, and she has to limp, as the result of her injuries. As the result of said injuries, plaintiff has become and will continue to be afflicted with leucorrhœa. Plaintiff says that by reason of said injuries she has been damaged in the sum of \$15,000; wherefore, plaintiff prays judgment against said defendant for said sum of \$15,000 and costs of suit."

[Then follows the evidence which is set out at length.]

On the question of excessive damages the court said:

"The final insistence of counsel for appellant is that the verdict of the jury was excessive, and that the judgment should be reversed for that reason. It is their contention that, assuming that the respondent was entitled to recover under the evidence, yet the amount of the verdict 'is so outrageously excessive, unjust and oppressive as to shock the conscience of any reasonable person, and must have been brought about by passion or prejudice, or a misunderstanding of the legal effect of the testimony on the part of the jury in respect to plaintiff's alleged injuries.' No reasonable person can read this voluminous record without coming to the conclusion that prior to the date of the injuries complained of respondent had been sick and diseased in and about the pelvic regions, involving the uterus, peritoneum, cervix, and fallopian tubes, as well as their connecting parts. The evidence is also equally conclusive that the neurotic troubles she then suffered from were due to and directly traceable to that diseased condition of those parts of her person. It is true she testified that the operation performed upon her was successful, and that she had completely recovered from all of those previous troubles prior to the infliction of the injuries sued for. She also introduced other testimony in corroboration thereof, which tended to prove her recovery. But, upon the other hand, there was much convincing testimony introduced by appellant which was contradictory of her testimony in that regard, and which tended strongly to show that she had not fully recovered from her previous ailments at the time she claims she received the injuries complained of in this case. That conflicting testimony presented a question of fact for the jury's determination; yet when we consider the fact that the evidence of such injuries rests largely in the mind and conscience of the injured party, and the difficulty with which they

may be disproved, under the most favorable circumstances, if the party is simulating (of which there is much evidence in the record), it then becomes the duty of the courts to scrutinize all phases of such claims; and where the record discloses the fact that the jury misunderstood the evidence, or ignored the same, or did not give effect to the greater weight thereof bearing upon a particular question, or returned a verdict for an excessive amount, then it becomes the plain duty of the court to step in and correct the wrong or injustice done thereby. And when we read this record and consider the cause of respondent's injury, the similarity of her former condition and troubles to her present condition and complaints, taken in connection with the size of the verdict, we are fully convinced that the verdict was excessive and out of proportion to the injuries she received. When we recall the manner of her injury, what caused it, the conductor pulling her against the end of the slowly moving car, which moved only four to six feet, and in her own language, 'I just come down in a heap on my feet, just all in a bunch, so to speak,' then, in our judgment, that alone would not have caused the serious injuries she claims to have received in consequence thereof, nor warrant a verdict for \$7,000.

"The judgment is excessive, and it will be reversed and the cause remanded, without respondent will within ten days from and after this date enter a remittitur of \$3,500 upon the judgment. If the remittitur is entered within that time, then the judgment will be affirmed. All concur."

Boarding street car on viaduct — Railings — Evidence — Assumption of Risk — Instructions.

In *JOYCE v. METROPOLITAN STREET RY. CO.*, (*Missouri Supreme*, Division No. 1, March, 1909) 118 S. W. 21, action for injuries received by plaintiff while attempting to board one of defendant's cars, judgment for plaintiff for \$5,000 (verdict for that amount being signed by nine jurors) in the Circuit Court, Jackson county, was reversed for errors, among others, for an abuse of judicial discretion in the rejection of a juror admission of evidence as to negligent construction of a viaduct by showing how similar viaducts are protected by railings in other cities, and the refusal to instruct as to assumption of risk of danger by plaintiff. The accident occurred July 1, 1904, at Eighth and Main streets, in Kansas City, Missouri, at which point defendant maintained an overhead viaduct some twenty-nine feet above Main street on Eighth street. The opinion by GRAVES, J., sets out at length the complaint and the evidence and instructions on the trial.

The negligence charged is stated in the petition (among other paragraphs) as follows:

"Plaintiff states that on said July 1, 1901, at about six p. m. thereof, he was in the act of boarding one of defendant's said Independence avenue cars, east-bound, on said viaduct, for the purpose of being carried on said car as a passenger to the eastern part of Kansas City; that while he was thus attempting to get upon said car he was injured, through the carelessness and negligence of defendant as hereinafter set forth.

"Plaintiff states that defendant carelessly and negligently built, maintained, and used said viaduct in a dangerous and defective condition in this, to wit: A certain iron railing or fence was allowed to be and to

remain at the eastern end of the platform on said viaduct at or near the place where passengers were in the habit of getting on and off defendant's cars, with defendant's knowledge and consent; that said iron railing or fence was at all of said times by defendant carelessly and negligently allowed to be and remain in a dangerously close position and proximity to the front end of the cars and to the sides of the cars when passing said iron fence or railing, and said iron railing or fence was at all of the said times by defendant carelessly and negligently allowed to be and to remain in such a relative position to said cars that if a person should get between, or be knocked between, or fall between said iron fence and said passing car, there was not room enough for said car to pass without greatly injuring said person, all of which was well known to defendant, or by the exercise of due care and caution could have been known to defendant on July 1, 1904, and for a long time prior thereto.

"Plaintiff states that at the time he was getting on said car, and at the time he was injured as hereinafter stated, he was getting on said car at the usual, ordinary, and customary place for people to get on and off defendant's cars on said viaduct, and at the place where defendant invited the public to get on and off its cars, viz., at or near the eastern end of the platform of said viaduct, and about even with the sidewalk line on the east side of Main street." * * *

The requested instruction that was refused reads: "The court instructs the jury that the plaintiff had no right to get upon or attempt to go upon the car in question after it had started and while it was in motion, and if he did so he thereby assumed all risk of danger caused thereby; and if you believe and find from the evidence that after the car had started, and while it was in motion, plaintiff attempted to get upon the car, and was struck or thrown down and injured by the motion of the car, then you are instructed that his injuries, if any, were caused by his own fault and negligence, and you must find your verdict for the defendant." The court said: "There is evidence in behalf of defendant to the effect that, when this car started, the plaintiff was some three feet from it and did not have hold of it, and that he attempted to board it after it was in motion. The evidence of the conductor and some others tended to show this fact. This instruction was based upon that evidence, and was one of defendant's theories of defense. This theory was not squarely presented in any instruction given, and was a theory under the evidence which should have been presented to the jury. The court erred in refusing the instruction. Whilst in all cases and as a general proposition this instruction might not be good, and probably would not be good, but under the facts of this case, with the railing in plain view, it is good."

Rehearing denied, April 13, 1909.

Child injured while boarding car — Personal injuries — Evidence — New trial

IN *RAFFERTY v. PUBLIC SERVICE RY. CO.*, (*New Jersey Supreme*, June, 1909) 75 Atl. 41, action for personal injuries sustained by plaintiff, a child about seven years old, while trying to board one of defendant's trolley cars, there was a verdict for plaintiff for \$4,000, and defendant obtained a rule to show

cause why a new trial should not be granted. On the hearing the rule was made absolute, the opinion being rendered by PARKER, J., the ground being stated in the opinion by the court as follows:

"The plaintiff sustained personal injuries by being thrown from the defendant's trolley car, and it was claimed that as a result of the accident she was suffering from a disease known as 'pachymeningitis,' which manifested itself in impaired mentality and other allied symptoms. All the medical witnesses on the plaintiff's main case and all the medical witnesses for the defendant agreed that the plaintiff, who was a young child, was suffering from adenoids, and the claim of the defendant was that the impairment of mental force and other symptoms testified to could be accounted for by this fact. On the plaintiff's rebuttal the court permitted another medical witness to be sworn for the first time, and to testify that he had examined specially for adenoids, and they did not exist. *Held* that, while the admission of this testimony was not legal error, it injected a new issue into the case at a stage when the defendant was not fairly in a position to meet it, and that a new trial must be ordered."

Boarding street car — Damages — Remittitur.

In *CORCORAN v. ALBUQUERQUE TRACTION Co.*, (*New Mexico*, January, 1909) 103 Pac. 645, action for damages for injuries sustained by plaintiff while boarding defendant's street car, judgment for plaintiff in the District Court, Bernardillo county, was *affirmed*. The opinion was rendered by PARKER, J. "Appellee brought an action for damages for personal injuries received by reason of the alleged negligence of appellant, and the jury rendered a verdict for \$2,000 damages. They also made special findings as to whether the street car moved while appellee was in the act of boarding it, and as to the number of the car in question. On motion for a new trial the court below compelled a remittitur down to \$1,100 damages, and, upon remittitur being filed overruled the motion, and expressly refused to find the verdict for \$2,000 damages was the result of passion and prejudice on the part of the jury, holding simply that the verdict was excessive for the injury suffered."

Boarding moving street car — Contributory negligence.

In *QUINN v. PHILADELPHIA RAPID TRANSIT Co.*, (*Pennsylvania*, March, 1909) 73 Atl. 319, judgment for plaintiff in the Court of Common Pleas for \$4,500, in an action for injuries sustained while boarding one of defendant's cars, was *reversed* on the ground of contributory negligence. The case is stated in the opinion by POTTER, J., as follows:

"It is admitted in this case that the plaintiff attempted to board a moving car, which at the time was going faster than a man could walk. It is urged, however, upon the part of the plaintiff, that even if his carelessness in this respect be conceded, yet, at the instant when he was thrown from the car, he had passed the initial point of danger, and had attained what his counsel contend was a place of safety. The trial judge instructed the jury that if they found that the plaintiff, while attempting to board a moving car, was thrown from it, in the very act of getting upon it, he could not recover, as such an act would clearly have been

negligence upon his part; but we are satisfied from a careful examination of the evidence that there is really no conflict as to this point. The only reasonable inference that can be drawn from the plaintiff's own statement is that he was injured in the very act of attempting to board a moving car of the defendant company, while it was going at considerable speed. This being the case, it was the duty of the court to say that under the evidence the plaintiff had failed to exercise reasonable care to prevent harm to himself, and that his injury was the result of his own fault, and he could not recover.

"The testimony shows that the car which plaintiff attempted to mount was running north on Fourth street, and had passed the intersection with Dauphin street, and had begun its run towards the next intersection, at the time the plaintiff attempted to get upon the running board. There is nothing in the evidence to show the motorman or conductor knew that the plaintiff wanted to get on the car at the time, until he made the effort to do so. If the car had been standing still at the regular place for passengers to get on, and the evidence had tended to show that it had been started suddenly while plaintiff was in the act of stepping up, the question would have been for the jury; but, as it was, there was nothing to warn the men in charge of the car of any impending peril to the plaintiff. There was therefore no duty upon them at that time with respect to the plaintiff, and there was no evidence of any negligence upon their part. On the contrary, the contributory negligence of the plaintiff is plainly apparent from his own story of the occurrence. He said that as the car came up to him he attempted to throw his body along it, 'to grab it as it came along.' He testified upon cross-examination that as near as he could judge the car was about a length past the crossing when he tried to get on, and that it was about a length and a half above the crossing when he fell to the ground. This shows conclusively that his attempt to mount the side of the moving car and his fall to the ground were practically instantaneous. It was a continuous performance. The running board is not a place of safety. It is not intended for the use of passengers except as a means of ingress and egress. And the fact that plaintiff had not gotten beyond the running board, when he was thrown off by the motion of the car, shows that he had not completed his perilous intention of mounting the moving car. The testimony of the passengers who were on the car does not contradict that of the plaintiff, but it adds much to the details which under the circumstances he naturally could not be expected to recall. One passenger, sitting in the seat next to the back seat, said, in describing the accident: 'I was sitting there, and I saw a man make a grab for the car. I could not say if he got hold or not. By the time I turned my head he was down, lying on the street.' He further said that the car was running pretty lively at the time. Five other witnesses agree substantially in saying that plaintiff jumped for the running board, and whether or not he succeeded in getting his feet on, he was almost instantly thrown off. Of course, if the testimony of the other witnesses contradicted the plaintiff, it would be for the jury to reconcile the discrepancies; but it all practically supplements the plaintiff's own story. The facts of the case bring it within the rule that to step on or off a moving car is in itself an act of negligence." * * *

Passenger with incumbrances boarding street car — Sudden start — Signal — Carrier not negligent.

IN BOSTON ELEVATED RAILWAY CO. *v.* SMITH, (*U. S. Circuit Court of Appeals, First Circuit, Massachusetts*, March, 1909) 168 Fed. 628, action of tort to recover for injuries to plaintiff, a passenger on an electric car operated by defendant, caused by the sudden movement of the car in starting just as she had boarded the same, verdict for plaintiff in the Circuit Court for the District of Massachusetts was set aside, judgment reversed and new trial ordered. The opinion was rendered by COLT, Circuit Judge, the facts being stated as follows:

"On November 15, 1906, about eight o'clock in the evening, when returning home from her work, the plaintiff boarded one of the defendant's inward-bound cars at the corner of P and Third streets, South Boston. She was carrying in her hand at the time an umbrella and a small hand bag. The night was stormy. The car had just left the car house, and the only other persons on the car except the motorman and conductor of the car were three conductors employed by the defendant, who were returning home after their day's work. The car was a vestibuled closed car, and the threshold of the door leading into the car was six and a half inches above the floor of the platform, and on this threshold were two small projections on which the door runs.

"The plaintiff was a German woman, fifty-two years of age, five feet five inches in height, and weighed about 198 pounds. She was a stout woman in appearance, and she was slow in her movements. She was accustomed to riding on electric cars. According to her story, she had mounted the platform, and was about to enter the car door, with her umbrella and bag in one hand, and holding her dress in the other, when the car was started with a sudden jerk, which threw her to the floor, injuring her leg, abdomen, and arm." * * *

The court reviewed the evidence, holding there was no substantial evidence showing that the car started with any unusual jerk, and said: 'It is well understood by persons accustomed to ride on electric cars that the cars are liable to start with more or less of a sudden movement or jerk. Since this is one of the known and common incidents of traveling by this mode of conveyance, the ordinary passenger may be said to assume this risk. He expects that the car may start with a greater or less degree of jerk, and he realizes that he must exercise due care to protect himself against such a movement. The mere fact, therefore, that the car started with a sudden movement or jerk, and that the plaintiff was hurt, does not make out a case of negligence in the manner of starting the car, but the proof must go further and show that the start was unusually sudden or violent.' (Citing *McCann v. Boston Elevated Ry. Co.*, 199 Mass. 445, 85 N. E. 570; *Byron v. Lynn & B. R. Co.*, 177 Mass. 303, 305, 58 N. E. 1015; *Jameson v. Boston Elevated Ry. Co.*, 193 Mass. 560, 562, 79 N. E. 750, 751; *Timms v. Old Colony St. Ry. Co.*, 183 Mass. 193, 66 N. E. 797, 13 Am. Neg. Rep. 582; *Sanderson v. Boston Elevated Ry. Co.*, 194 Mass. 337, 80 N. E. 515.)

"It is settled law in Massachusetts that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly upon the car. *Sauvan v. Citizens' Electric*

St. R. Co., 197 Mass. 176, 177, 83 N. E. 405. The practical reasons underlying this rule are obvious. The public demands as rapid transportation on the street cars as conditions will permit. To this it is necessary that there should be as little delay as possible in the frequent stopping of the cars to take on passengers. If, therefore, it were the duty of the conductor to wait until each passenger is seated before giving the starting signal, it would result in much delay, and consequently the running time would be much slower, and hence it has become the common practice under ordinary circumstances, for the conductor to ring the starting bell as soon as the passenger is fully on the car; and it may be said that the ordinary passenger anticipates this as one of the usual incidents in the operation of street cars, and is accordingly on the lookout to protect himself from any serious consequences resulting therefrom." * * *

"The facts in the Sauvan Case very closely resemble those in the case at bar. In that case the plaintiff was 'a large robust woman weighing about 170 pounds,' who 'looked and was in perfect health.' She got upon the car at a regular stopping place when the car was standing still. She was proceeding to her seat when the car started, causing her to fall against the woodwork inside the car. According to her evidence, she had stepped up over the steps into the vestibule, and was fully and fairly on the floor of the vestibule of the car before the conductor rang the starting bell. Her complaint was that the starting bell was rung when she had put one foot on the floor of the car, had thrown her weight onto that foot and was in the act of bringing the other foot up and forward; and she contended that on this evidence the jury could have found that the conductor, in giving the signal to start the car when he did, did not use the care which is owed by a common carrier to one of its passengers. In the opinion of the court, Mr. Justice Loring said: 'If the starting was given when the plaintiff contends that it was given, it seems hardly possible that the car could have started before the second foot had reached the car floor or, at any rate, it might well be contended that the conductor could not have anticipated such an instantaneous response to his signal. But apart from that, it is settled in this commonwealth that under ordinary circumstances it is not negligence for a conductor to give the starting signal after the passenger is fully and fairly on the car.'

"We think the case at bar comes clearly within the Massachusetts rule laid down in the Sauvan Case; and it follows that, the plaintiff being fully and fairly upon the car, the conductor was not guilty of negligence in giving the starting signal.

"The judgment of the Circuit Court is reversed, the verdict set aside, and the case remanded to that court with directions to order a new trial, and the plaintiff in error recovers costs in this court."

Boarding trains.

Child thrown from car by sudden start of train as she was boarding same with parent—Husband and wife—Witness.

In *MILES v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RY. CO.*, (Arkansas, May, 1909) 119 S. W. 837, judgment for defendant railway in the Circuit Court, Hot Spring county, was reversed. The opinion was rendered by Wood, J., who in stating the case set out the facts as follows:

"The answer of appellee denied all the material allegations, except the killing, and set up contributory negligence on the part of the mother of Mary Ellin Miles. The evidence on behalf of appellant tended to show the following facts: That Elvira Miles was the wife of Tom M. Miles, and that they resided at Perla, Ark., and that on the 24th day of August, 1908, about ten o'clock A. M., Elvira Miles was at Smackover, Ark., a regular station on the St. Louis, Iron Mountain & Southern Railroad Company, with their child, Mary Ellin Miles, who was three and a half years of age, for the purpose of boarding the local freight train of the said St. Louis, Iron Mountain & Southern Railroad Company as a passenger to go to Perla, Ark., and, after said train came up to the station and stopped where passengers usually get on and off of said train, that the said Elvira Miles started to board said train with her child, and that she set her basket down and lifted the child up on the front platform of the caboose, and then stooped down and picked up her basket and started to get on herself, and that as she started to get on, and while she had hold of one of the handholds with one hand and one foot on the bottom step of the platform, and before the child got inside of the caboose, the train shoved back with a sudden jerk and threw the child down on the track between the cars, and caused it to be run over by the wheels of the car in front of the caboose, which crushed one leg and one thumb; that the child was taken from under the cars and carried to a doctor's office, where the leg was amputated and the thumb dressed, and, after this, was carried to a house near by, where it was kept until the next day about one o'clock P. M., at which time it died from the effects of the injuries received; that it was conscious all the time after it was injured, except when it was under the influence of anæsthetics while it was being operated on; that the train was still when she started to get on, and, as she was in the act of getting on, one of the brakemen gave a signal to back up; and that the train did back in the manner stated and caused the injuries alleged. There was evidence tending to prove that all the passengers had not debarked, and one of them had started to get off, but had not reached the door, when the little girl fell. The appellant offered to prove by Elvira Miles, the wife of Tom Miles, the plaintiff, that Mary Ellin Miles was injured and killed as alleged in the complaint, but the court refused to allow Elvira Miles to testify on the ground that she was not a competent witness. The appellee adduced evidence tending to prove that it was not negligent in operating its train on the occasion when Mary Ellin Miles was injured." * * *

The court, among other rulings, held that it was prejudicial error to exclude the evidence of the wife, as her situation at the time of the accident enabled her to have, perhaps, a more accurate knowledge of the facts than any other witness. After citing several cases on the question the court said:

"And in *Railway Co. v. Rexroad*, 59 Ark. 180, 26 S. W. 1037, we said (quoting syllabus): 'In an action by a husband as next friend for the sole benefit of an infant child, his wife is a competent witness, as he is merely the manager or conductor of the suit, and the fact that he is liable for costs does not disqualify her, under *Mansf. Dig.*, § 2859, providing that husband and wife shall be incompetent to testify for or against each other.'

"So here the husband is acting in his fiducial capacity. He is suing for the sole benefit of the estate. If he should recover, and should receive a part of the fund recovered as a distributee of his daughter's estate, still that would not make the present suit one in his own name and right. We are of the opinion that, when the husband sues, not in his individual, but representative, capacity, the suit is not by and for him, and therefore the wife in such case is not a witness for him in the meaning of the statute." * * *

Trespasser fatally injured while trying to board train—Railroad company liable.

In *LOUISVILLE & NASHVILLE R. R. Co. v. PLUNKETT*, (Georgia, October, 1909) 65 S. E. 695, judgment for plaintiff in the City Court of Sparta, in an action for fatal injuries to plaintiff's husband, a trespasser, caused while trying to board defendant's train, was *affirmed*. In stating the facts the court (per RUSSELL, J.) said:

"Mrs. J. C. Plunkett sued the railroad company for the homicide of her husband and recovered a verdict. The defendant excepts to the overruling of a motion for a new trial containing only the general grounds. The deceased was a passenger from Macon to Mayfield on the defendant's railroad, and, when his destination was reached, he was so intoxicated that it was necessary for him to be bodily removed from the train. He was placed on some grass about thirty-five feet from the track on the right of way on the same side of the track as the station near a path leading from the station to the public highway. Just as the train was moving off from the station the deceased arose from the ground, and attempted to board the train. He caught hold of the handrails between the two cars, and, in attempting to pull himself up on the platform, missed the step, and fell in such a way that he was dragged for about 100 feet, with his hands clinging to the handrails, and his body swinging between the two cars, when he lost his hold and fell, and was run over by the wheels of the rear car of the train, receiving the injuries from which death resulted.

"There is a great deal of conflict in the testimony as to the exact time when the deceased's presence became known to the train employees. Certain eyewitnesses standing near the scene of the injury testified that the deceased was seen by the employees as he was approaching the train, and also after he was hanging between the cars, and that they made no effort to extricate him or to stop the train until after he lost his hold and fell. This was squarely contradicted by the employees; they stating that he was not discovered until he was actually hanging between the cars, and that then it was too late to stop the train so as to avoid injuring him, although every effort was made to do so. The train was equipped with two kinds of apparatus for stopping it—the ordinary signal which was given by pulling the bell cord, and an emergency brake. The service signal communicated with the engineer and instructed him to apply the brakes; while the emergency brake was operated directly by pulling a lever or a cord inside the car. At the time of the injury, the train was running at the rate of two miles an hour on a level track, and, under such circumstances, the ordinary service signal would stop it in from twelve

to fourteen feet, while the emergency brake would stop it in from six to eight feet. The only signal given was the ordinary service signal. The employees stated that the reason the emergency brake was not applied was that it was so situated that it could not be reached as quickly as the other signal. It appears that the baggage master (who is also called the flagman) was standing in the door of his car, that he saw the deceased before he fell, and that the lever by which the emergency brake was applied was on the opposite side of the car about six feet from him. Only a few seconds intervened after the deceased missed the step and was hanging between the cars before he was injured." * * * (JOS. B. & BRYAN CUMMING and W. H. BURWELL, for plaintiff in error; NAPIER & MAYNARD, ROBT. L. BERNER, and R. B. MERRITT, for defendant in error.) * * *

The rulings are stated in the syllabus by the court as follows:

"1. The quantum of care which should be exercised toward a trespasser is to refrain from wilfully or wantonly injuring him, or (which is the same thing) to use ordinary care to protect him from injury after his presence is discovered. The question as to whether the employees of the railroad used this degree of care toward the plaintiff's husband was for the jury.

"2. Even though a trespasser is negligent, his negligence will not bar a recovery where the evidence authorizes a finding that a violation of the duty to use ordinary care to avoid injuring him after his presence is known is the proximate cause of his injury."

*Passenger fatally injured while crossing track at station to board a train—
Degree of care required of carrier—Contributory negligence for jury.*

In *DIECKMANN v. CHICAGO & NORTHWESTERN RY. CO.*, (Iowa, June, 1909) 121 N. W. 676, judgment on verdict directed for defendant in the District Court, Linn county, was reversed. The opinion by WEAVER, J., states the case and points at length. The court said: "The following facts are undisputed: The defendant operates a double track railway, passing east and west through the town of De Witt, Iowa. The ticket office, waiting room, and main platform of the station are north of the tracks. Trains move eastward on the north track and westward on the south track, and west-bound passengers are required to pass from the main platform over a planked way across both tracks to a platform on the south side in order to board their trains. At about eleven o'clock of the night of March 31, 1902, Frederick J. Dieckmann, a traveling salesman, went to the station to take the west-bound train, which was due there about twenty minutes later. He purchased a ticket from De Witt to Cedar Rapids, and when the approach of the train was announced, or very soon thereafter, he picked up the grips which he was carrying, and started in the direction of the south platform. At or about the same time the station agent, taking a lantern, went in the same direction, and both he and Dieckmann were struck by the train, the former being instantly killed, and the latter mortally injured, dying the next day." * * *

"Plaintiff's claim for damages is based upon the theory that, when Dieckmann went to the station and purchased a ticket for passage on a train nearly due, the relation of carrier and passenger then became effective, and that the railway company thereupon became bound to

exercise the highest degree of care for his safety, and to provide him a safe way to the train and opportunity to reach the platform without injury, as well as to furnish proper escort and direction to the passenger if reasonably necessary to insure such safety. In these respects it is alleged the company was negligent. The defendant denies negligence on its part, and insists that the intestate was clearly guilty of contributory negligence. Upon a former submission the ruling of the trial court directing a verdict for defendant was sustained (*Dieckmann v. C. & N. W. R. R. Co.* [Iowa, 1906] 105 N. W. 526, 19 Am. Neg. Rep. 232); but, a petition for rehearing having been granted, the case has been reargued by counsel on both sides with great thoroughness." * * *

The court held that deceased was a passenger at the time he attempted to cross the tracks, and defendant was bound to the degree of care required of a carrier (citing numerous authorities); and that the burden was upon defendant to negative the presumption of negligence.

On the question of contributory negligence the court held that it was for the jury to determine from the facts of the case. (*SHERWIN, J., dissented.*)

It was also held that the defendant was bound to protect passengers crossing the tracks under such circumstances, and that it would be negligent in failing to announce the train in time, or light the crossing, or guide passengers across the tracks, if due care required such precautions.

On the former appeal, *DIECKMANN v. C. & N. W. R. Co.*, (Iowa, January, 1906) 19 AM. NEG. REP. 232, 105 N. W. 526, it was held:

"Although a railroad station was so arranged that it was necessary for a passenger to cross the tracks in order to take his train, he was not relieved for that reason from the duty of exercising due care, and where the headlight of an approaching train could be plainly seen for a distance of two miles before it reached the station, and the whistle was sounded, and the bell was rung, and the passenger was struck and killed by the train as he was crossing in front of it, he was guilty of contributory negligence that barred recovery for his death.

"There was no duty owed by the railroad company to furnish an escort to the passenger across the tracks."

CHARLES A. CLARK & SON and WM. G. CLARK appeared for appellant; JAMES C. DAVIS, CLARK & McLAUGHLIN, and GRIMM, TREWIN & MOFFITT, for appellee.

Passenger with child in arms injured while boarding train — Sudden start — Signal — Carrier liable.

In *MISSISSIPPI CENTRAL RY. CO. v. TURNAGE*, (*Mississippi*, June, 1909) 49 So. Rep. 840, appeal from judgment for plaintiff in the Circuit Court, Jefferson Davis county, judgment was *affirmed*. "The appellee brought suit for injuries received by her while attempting to board the passenger train of appellant. The injuries were alleged to have been caused by the gross negligence and carelessness of the servants of the railroad company in starting the train while appellant, with her small baby in her arms, was on the steps attempting to get aboard; it being alleged that the flagman of the company saw her in this position and gave the signal to start, and appellee was thrown violently to the platform and severely bruised and injured, so that her health was broken. At the time of the trial, which was more than a year after the

injuries were received, she still suffered from the effects thereof. There was trial to a jury, a verdict for \$6,750, and judgment accordingly. On appeal there are three assignments of error: First, that the judgment is excessive; second, improper remarks of counsel in making his argument to the jury, which consisted of references to recoveries in other cases for injuries caused by railway accidents; third, admission of certain testimony as to injuries and suffering." The opinion was rendered by MAYES, J., who held that "alleged improper remarks made by counsel in his closing argument will not be reviewed where no exceptions were taken at the time," and that "non-expert witnesses may testify to declarations or expressions of present pain and suffering by the person injured." Suggestion of error overruled, June 28, 1909.

Boarding train — Sudden start — Carrier liable — Damages.

In *GOLDMAN v. CENTRAL RAILROAD OF NEW JERSEY*, (*New Jersey Supreme*, November, 1909) 74 Atl. 261, the facts are stated in the opinion by MINTURN, J., as follows:

"While attempting to board defendant's car, at the Ferry Street Station in Newark, the plaintiff was injured, as he claims, by the negligent starting of the train by defendant's servants. The defendant contended that the plaintiff's injuries were the natural result of his contributory negligence in attempting to board the train while it was in motion. Upon this issue a previous trial resulted favorably to the plaintiff, but the verdict was set aside by this court upon the ground that the clear preponderance of the testimony did not support it. Upon a second trial the jury disagreed; while upon this trial a verdict for \$6,000 was returned for the plaintiff, and that verdict is now here upon a rule to show cause, upon the argument of which it was contended that the verdict is against the evidence and is excessive.

"The plaintiff's version of the occurrence was corroborated by two other witnesses; one of whom, Adam Ohl, a machinist, and an apparently disinterested and reliable witness, testified in answer to the inquiry: 'What occurred when you got there, what did you see? A. Well, I went up to the Congress street entrance, the outside. I got within two steps of the top platform, and I saw the train stand there, and my intention was to get that same train, and I saw Mr. Goldman get on this train while it was standing still. He had his two feet on the first step; and the next thing I knew the train gave a jerk, and I looked around and I saw Mr. Goldman losing his grip and being dragged in between the bridge and the car. I went then and notified the conductor, or I mean the ticket agent in the depot. Then the train went right on; it didn't stop.' At the first trial this witness did not testify; and his testimony therefore introduces into the case, *sub judice*, an element of corroboration which did not exist upon the previous rule to show cause. This witness is corroborated by Abraham Schaffer, a painter, who also saw the occurrence; and, while his testimony is attacked upon the ground that it was a physical impossibility for him to witness the accident, owing to intervening obstructions to the view, we have concluded that the credibility of his story is for the jury, and not for us to determine. To meet this posture of the case defendant called the train crew and two other witnesses, whose tes-

timony was directed to supporting the contention of defendant; and, while it is possible that a court to whom the entire testimony is submitted for review may be inclined to voice its approval of the defendant's contention under the testimony, nevertheless we must be mindful of the fact that the limitation of our duty is to determine, whether a verdict is so egregiously unjust that the jury in reaching it must, through the medium of passion, prejudice, or corruption, have violated that fundamental rule of jurisprudence governing the conduct of juries which requires that they alone shall be the arbiters of the facts, where there is a reasonable dispute upon the testimony, and also that their verdict may be influenced, not only by the number of witnesses, but also by the credibility of the witnesses, under all the facts and circumstances, including their appearance and conduct at the trial—factors which are entirely absent upon argument before us, at the bar of this court. *Bowell v. Public Service*, (N. J. Sup.) 71 Atl. 119; *Anders v. Knights of Honor*, 51 N. J. Law, 179, 17 Atl. 119; *Merritt v. Harper*, 44 N. J. Law, 74; *Kulman v. Erie R. R.*, 65 N. J. Law, 241, 47 Atl. 497; 12 Cyc. 292, and cases; 2 *Rice on Evidence*, p. 788. Nor can we say that this verdict is excessive, when we recall that the plaintiff was thirty-six years old, and had an earning capacity of thirty-six dollars per week; that his leg was twice amputated, and that he is now crippled for life; that he has a tumor upon his hip, upon which another operation is possible; that his earning power has been impaired, so that he is able to earn but twelve dollars weekly, while his expenditures for treatment and for a wooden leg have exceeded \$600, not to mention the pain and suffering he has undergone, compensation for which at the best is problematical." * * *

Rule to show cause discharged. (SAMUEL KALISCH and CHAUNCEY G. PARKER appeared for plaintiff; GEORGE HOLMES and WILLIAM D. EDWARDS, for defendant.)

ATLANTA & WEST POINT R. R. CO. v. HARALSON.

Supreme Court, Georgia, August, 1909.

1. ALIGHTING FROM TRAIN—PERSONAL INJURIES—DAMAGES—EVIDENCE—ABILITY TO LABOR.—Where, in an action for damages on account of a personal injury received in alighting from a railroad train, the petition alleged that the plaintiff's injuries were permanent, and that his ability to labor had been reduced about one-half, after the plaintiff had testified as to the injury and its nature and character and given all the material facts touching his physical condition, his previous capacity, and his subsequent incapacity resulting therefrom, it was not error to allow him to state that he could not do more than half as much labor in his vocation as a blacksmith since the injury as he could before it occurred. *Atlanta & West Point R. R. Co. v. Johnson*, 66 Ga. 259 (syl. para. 2,

4a), 14 Am. Neg. Cas. 223n; *Chattanooga, Rome & Col. R. R. Co. v. Huggins*, 89 Ga. 494, 15 S. E. 848, 11 Am. Neg. Cas. 350n (1).

a. This evidence was not rendered inadmissible because the witness also testified that his injuries had affected him as a blacksmith, that he had to give up his trade on that account, that he was working in a blacksmith shop, and was fitting himself for blacksmithing.

b. The objection to the evidence as not being warranted by the pleadings was without merit.

2. **ALIGHTING FROM TRAIN — EVIDENCE — NARRATION OF PAST TRANSACTION — HARMLESS ERROR.** — Where the plaintiff claimed that he was injured by a fall in attempting to alight from a railway train while in motion under the direction of the conductor, there was no error in allowing a witness who had testified that as the plaintiff attempted to leave the train he pitched forward, fell, and rolled over on the ground, to state, "I don't remember plaintiff saying anything as he arose, except that he was hurt on his shoulder and leg and hip," there being nothing to indicate that this was an afterthought or was a mere narration of a past transaction. *So. Ry. Co. v. Brown*, 126 Ga. 1, 5 (syl. para. 2), 54 S. E. 911, 912.

a. Especially will this furnish no ground for reversal, where the presiding judge, in a note to this ground of the motion for a new trial certified that the witness had already testified, without objection, that immediately after he got up he stated that he was hurt, and that his shoulder was hurt.

3. **DAMAGES — PERSONAL INJURY — DIMINUTION OF CAPACITY TO LABOR.** — If a person's capacity to labor was permanently diminished by a physical injury wrongfully inflicted upon him by another, such permanent diminution of capacity to labor was for the consideration of the jury in determining the amount of the recovery, notwithstanding there may have been no proof showing a diminution of earnings or loss of time after the injury, and the pecuniary value thereof.
4. **SAME — QUESTION FOR JURY.** — If it be sought to recover because of a decreased ability to earn money, or because of a loss of time, entailing pecuniary loss, there must be some proof as to such diminished earnings or earning capacity, or the value of such lost time, in order to authorize a submission to the jury of the question of such pecuniary loss; but permanent diminution of capacity to labor is for the consideration of the jury, along with such elements of damage as pain, suffering, disfigurement, or the like, if proved, in determining the amount of damages to be awarded.
5. **CARRIER OF PASSENGERS — EXCURSION TRAIN — CONDUCTORS.** — If, on an excursion train carrying many passengers, a railroad company placed two conductors, or two persons intrusted with the duty of performing the usual functions of a conductor in taking up tickets, notifying passengers of stations, directing their movements, or the like on different parts of such a train, as between

1. See, at end of the case at bar, Notes of cases arising out of injuries to passengers alighting from cars.

the passenger dealing with one of such agents in connection with such duties and the company whom he represents, he would stand in the place of a conductor, whether he was such permanently or not.

6. SAME — ANNOUNCING STATION. — If, on the train consisting of a large number of coaches and carrying many passengers, the conductor was unable to fully discharge the usual duties of his position between stations, and with his authority and knowledge of another employee of the railroad on the train took charge of a section thereof, and acted as the conductor in connection with it and with taking up tickets, notifying passengers of stations and directing them in regard to alighting, and if there was nothing to indicate that he was not the conductor, and a passenger so dealt with him, believed him to be the conductor, and acted on his announcements of a station and under his command as to leaving the car, the company would be liable to such passenger for an injury occurring in leaving the train, to the same extent as if the person thus acting was the conductor.
7. IMPROPER REMARK CORRECTED. — From a note of the presiding judge appended to the motion for a new trial, it appears that the improper remark of counsel for plaintiff, made during the progress of the argument of counsel for defendant, was held to be improper and its effect was corrected by due instructions to the jury.
(*Syllabus by the Court.*)

ERROR from Superior Court, Troup County.

ACTION by E. W. Haralson against the Atlanta & West Point Railroad Company. From judgment for plaintiff for \$1,500, defendant brings error. *Judgment affirmed.*

E. W. Haralson brought suit against the Atlanta & West Point Railroad Company to recover damages for a personal injury. He claimed: That he was a passenger on board an excursion train returning from Atlanta to Gabbettsville. That he surrendered his ticket to the conductor. That about 8:45 P. M. the agent having charge of the train, "the conductor, as aforesaid, called out Gabbettsville, slackening his train down to a low rate of speed." That the plaintiff, relying on the announcement of the conductor as to the station proceeded to the platform of the passenger coach and down on the steps, for the purpose of getting off. That the train did not come to a full stop; but the conductor came to the platform and said: "Gabbettsville! Get off! Get off! I will not slow up any more. There is no danger. Get off!" That the plaintiff, being unused to travel and not knowing at what speed the train was going, and relying on the instructions of the conductor, proceeded to get off the train, believing that he was in Gabbettsville at a point on the line of the road with which he was familiar. That in fact the station was Cannonville. That as he left the train he was jerked

violently forward, causing him to fall and be injured. The defendant denied all substantial allegations of the plaintiff.

On the trial the evidence was conflicting but the plaintiff introduced testimony in support of his contention. Throughout the evidence on behalf of the plaintiff, the person to whom he surrendered his ticket, and who, he contended, made the announcement of the station and commanded him to get off the train, was referred to as the conductor. The plaintiff testified that: "The conductor had on citizen's clothes, with a conductor's cap on. He had a conductor's ticket punch, and had a conductor's lantern with him, and acted as a conductor. He took up tickets going to Atlanta in the coach he was in, and coming back he did the same thing. There was no other (person) officiating in the coach we were in but this conductor." Another witness testified: "We went to Atlanta one day and came back the next day. The same train and same crew that carried us brought us back. So far as the conductor was concerned, they had two conductors." Another witness for the plaintiff testified: "I don't specially remember the man that called it (the station) out. It was one of the men in charge of the train. The man approached the entrance of the car. There were two men acting and taking up tickets. I had seen the man performing duties on the train. I don't know what he did — what they usually do."

A witness for the defendant testified: That he was the conductor on the excursion train in connection with which the injury was claimed to have occurred; that there was but one conductor on that train; that at Cannonville, where the plaintiff claimed to have been injured, the witness called out the proper name of the station; that he went through not over five cars, there being eight or ten in the train. In regard to another acting as conductor, he testified: "Only one man officiated as conductor on that occasion on that train. The first duty of a conductor is to see that his train is coupled up in proper shape, and that the brakes are in good order. After the train is coupled up and starts off on the road, it is the duty of the conductor to go ahead with his work, taking up tickets and checking out his freight. Where it is a passenger train, he goes to work with his tickets. In answer to the question if it is not almost impossible for one conductor to operate a passenger train of ten coaches and make the stops between Atlanta and West Point, where it stops every four or five miles, I reply that he won't get through his train from one station to another with a big train. In answer to the question as to whether, therefore, it is not necessary on an occasion of that sort in operating an excursion train, to have a conductor for each

two or three coaches, I reply we call on the flagman; but not but one conductor to a train. The flagman in such event does not perform the duties of a conductor. The flagman don't punch any tickets. They take them up and give the tickets to the conductor. One of the duties of the conductor is to take up tickets and check the passengers. If another man does that, he does not perform the duties of the conductor. He is just simply a helper. I just call him a helper. * * * It is likewise the duty of the conductor to announce the stations so far as he can." He stated: That he had a brakeman on that occasion by the name of Ruff; that he could not say whether the brakeman had on a conductor's cap or not, but he did not have a conductor's punch, because he was only a helper; that he might have had a street car punch or baggage punch, but not a train punch, that the witness did not know whether the brakeman had slips of the kind put in passenger's hats or not. He denied that he put Ruff there for the purpose of looking after about five cars, or that Ruff had charge of the passengers in those cars; but, in answer to the question, "If you say you are the conductor, and did not do it, who did?" he replied, "I reply, Ruff was a helper, and sometimes the other man was." When asked if he did not look after the five coaches in the rear, who did so, he answered that he did not know whether Ruff did so or not. He said: "I had helpers on that occasion. I had assistants. They were to help and assist the conductor in his work. I don't know whether he applied himself to five coaches or not. As to what were the duties of the helper on this occasion, he was to help get in and out of the side track, and to light up the train, and to get passengers on and off. He took up tickets only when we were crowded. We were crowded on this excursion, and we took up tickets. I don't know whether he checked any passenger or not. His duty was to handle the train, and to get them in and out." Ruff was not introduced as a witness.

The jury found for the plaintiff \$1,500. The defendant moved for a new trial. The motion was overruled, and the defendant excepted.

DORSEY, BREWSTER, HOWELL & HEYMAN and A. H. THOMPSON, for plaintiff in error.

SID. HOLDERNESS and F. M. LONGLEY, for defendant in error.

LUMPKIN, J. (after stating the facts as above). On most of the rulings contained in the headnotes no elaboration is necessary. Complaint was made in regard to the charge of the court on the subject of permanent diminution of capacity to labor, as constituting an element of damages. This point was raised by several grounds of the

motion, two of which will be sufficient to be set out. He charged: "If you find from the evidence that the plaintiff was injured, and that on account of such injuries the plaintiff's capacity to work has been permanently lessened, then the plaintiff could recover therefor." He refused a request to charge as follows: "Before the plaintiff can recover anything, as damages, on account of lessened ability to labor, he must show by the evidence that his capacity to labor has been lessened and the pecuniary value thereof," etc. This question is practically ruled in *City Council of Augusta v. Owens*, 111 Ga. 464, 36 S. E. 830 (syl. para. 8), 8 Am. Neg. Rep. 222. If a plaintiff seeks to recover for pecuniary losses resulting from lost time or permanent diminution of capacity to labor and earn money, he should introduce evidence on which to predicate such a recovery; but it has been held in this State that permanent diminution of capacity to labor is an element of damages for the consideration of the jury, in determining the amount of such recovery, along with the evidence as to pain, suffering, disfigurement, or the like, although no pecuniary value is proved by the evidence. It has been said that the loss of capacity to work is in the nature of pain, though no pecuniary loss be shown. *Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 200, 3 S. E. 757; *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647, 2 Am. Neg. Cas. 451, 15 S. E. 825; *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500, 508, 16 S. E. 49, 11 Am. Neg. Cas. 350n; *Brush Electric L. & P. Co. v. Simmonsohn*, 107 Ga. 70, 32 S. E. 902.

It was contended that, as the presiding judge mentioned permanent impairment of capacity to labor separately from his charge touching pain and suffering generally, the jury might have been misled into thinking that they might duplicate damages for pain and suffering, and that if lessened capacity to labor is an element of damage without regard to its effect on the plaintiff's capacity to earn money, it falls within the element of pain and suffering, and is not an independent element of damages. While the expression, "He is entitled to recover whatever the evidence may show," employed in one portion of the charge touching diminution of capacity to labor, may not have been an entirely apt mode of expression, yet, when taken in connection with the whole charge on the subject, we do not think that the charge of which complaint was made could have confused or misled the jury. They were distinctly instructed: That a right to recover on account of permanent impairment of capacity to labor, in the absence of proof as to earning capacity, did not authorize a recovery of anything on the latter ground or for loss of time; that the plaintiff could recover nothing on those

grounds; and that in arriving at their verdict they would allow nothing for loss of power or diminished capacity to make money or for loss of time, there being no evidence to authorize it. While the judge did not distinctly classify impairment of capacity to labor as being pain and suffering, under the ruling in *Atlanta St. R. Co. v. Jacobs*, 88 Ga. 647, 15 S. E. 825, 2 Am. Neg. Cas. 451, we cannot say that his charge on the subject was such as to require a new trial. In so far as the requests on this subject stated a correct principle of law, they were covered by the general charge. The request set out above did not correctly state the law.

If a railroad company places two conductors in charge of a train, or two agents having charge and with authority to direct passengers to alight, whether both be called conductors or not, within the sphere of their respective duties in this regard the company is bound by the conduct of each of them. In *Coursey v. So. Ry. Co.*, 113 Ga. 297, 300, 38 S. E. 866, it was held that a person who was injured in an attempt to leave a moving train, on command of the conductor, or the person in charge could not justify such action on his part without showing that the person who gave the command to alight was in fact the conductor or some other official of the railroad company having authority so to direct. It was also held that the fact that the person who gave the direction to the passenger carried a lantern on his arm and took up tickets from the passengers was sufficient to make out a *prima facie* case of his position. The grant of a nonsuit was reversed in that case, and a verdict subsequently rendered in favor of the plaintiff was allowed to stand. *So. Ry. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013. It is the duty of a carrier of passengers to provide proper agents in their cars. The conductor is generally in charge of the train. If an excursion train stopping at frequent points along the route is composed of so many coaches and is so crowded with passengers that the conductor cannot attend to his usual duties in connection with them, and authorizes another employee to perform the duties of a conductor with regard to certain coaches and the passengers therein, while he looks after other coaches, as to a passenger dealing with such employee in connection with the duties so assigned to him, and in reliance upon his being the conductor, he may be treated as such, *quoad hoc*. Of course, the mere belief on the part of the passenger that a certain agent is the conductor does not make him so or prove the fact; but, where the question involves the diligence or negligence of the passenger in acting under direction of such employee, his reliance upon the authority of the latter is a matter for the con-

sideration of the jury. Taking the charge on this subject complained of in connection with its context, we do not think there was any substantial error in it, if any inaccuracy at all.

While the evidence was conflicting, it was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial. *Lake Erie & W. Ry. Co. v. Fix*, 88 Ind. 381, 8 Am. Neg. Cas. 224*n*.

Judgment affirmed. All the Justices concur.

NOTES OF CASES ARISING OUT OF INJURIES TO PERSONS ALIGHTING FROM STREET CARS AND TRAINS.

In connection with the case of *Atlanta & West Point R. R. Co. v. Haralson*, (*Georgia*, 1909) 65 S. E. 437, 21 Am. Neg. Rep. 597, (preceding case reported herein), see the following cases:

Alighting from street cars.

Passenger injured alighting from car — Carrier liable.

In *BIRMINGHAM RAILWAY, LIGHT & POWER CO. v. PRITCHETT*, (*Alabama*, May, 1909) 49 So. Rep. 782, action for damages for injuries sustained by plaintiff, a passenger, while alighting from one of defendant's cars caused by sudden start or jerk of car, judgment for plaintiff in the Circuit Court, Jefferson county, was *affirmed*. Opinion by MAYFIELD, J.

Alighting from car — Sudden start — Carrier liable.

In *INDIANAPOLIS TRACTION & TERMINAL CO. v. MILLER*, (*Indiana Appeals*, Division No. 2, May, 1909) 88 N. E. 526, judgment for plaintiff in the Superior Court, Marion county, in an action for damages for injuries sustained while alighting from one of defendant's cars which was suddenly started as she was alighting therefrom, was *affirmed*. Opinion by COMSTOCK, J.

Passenger injured alighting from car — Carrier liable.

In *INDIANA UNION TRACTION CO. v. THOMAS*, (*Indiana Appeals*, Division No. 1, May, 1909) 88 N. E. 356, action for damages for injuries sustained while alighting from one of defendant's cars, judgment for plaintiff in the Circuit Court, Delaware county, was *affirmed*. Opinion by MYERS, J.

Alighting from street car — Duty of conductor as to signal.

In *BOMMARIUS v. NEW ORLEANS RAILWAY & LIGHT CO.*, (*Louisiana*, April, 1909) 49 So. Rep. 213, action for injuries sustained while alighting from one of defendant's cars, judgment for plaintiff for \$500 in the Civil District Court, Parish of Orleans, was *amended* and *affirmed*. The court (per PROVOSTY, J.) after stating the facts and sustaining the judgment except as to the matter of interest, said:

"We do not agree with defendant that it is not the duty of the conductor of an electric street car, before giving the signal for his car to resume its course, after one or more passengers have alighted, to look into his car to see if other passengers are not in the act of getting off

the car. Ordinary prudence would suggest that he do so. As to the rule in such cases, see 6 Cyc. 615; 5 Am. and Eng. Ency. 576.

"Interest is made to run on the judgment appealed from from judicial demand, instead of from date of judgment. This must be corrected, and has the effect of throwing costs of appeal on plaintiff. Plaintiff is really not responsible for this error, as he had prayed for interest only from date of judgment; but he should have corrected the error in the lower court by a remittitur.

"The judgment appealed from is amended, so as to make interest thereon run from date of judgment, instead of from judicial demand, and, as thus amended, is affirmed. Defendant to pay the costs of the lower court, and plaintiff those of the appeal."

Passenger injured alighting from car — Failure of carrier to observe ordinance.

In *JONES v. NEW ORLEANS RAILWAY & LIGHT CO.*, (Louisiana, May, 1909) 49 So. Rep. 706, judgment for plaintiff for \$500 in the Civil District Court, Parish of Orleans, was *affirmed*. Rehearing denied, June 19, 1909. The opinion was rendered by NICHOLLS, J., and the case is stated in the syllabus by the court as follows:

"This is a suit for damages for personal injuries alleged to have been received through the fault of the defendant company. The injury to the plaintiff was the result of the failure by the motorman of an upgoing car on Freret street to comply with the provisions of an ordinance passed by the city council of the city of New Orleans in the exercise of the police power for the protection of the lives and limbs of citizens. Through this ordinance it was sought to prevent one car from passing a car on a parallel track on the same street (which had stopped to permit a passenger to alight from it) until the passenger so alighting from it should have had time to cross the other track if he so desired. The ordinance so referred to was not enacted in the interest of any particular person, but in that of the general public, known not to be as careful as the danger of the situation would require, and to protect the citizens from the consequences of their own imprudence or forgetfulness. It is the duty of the court to see that ordinances enacted for the public safety should be rigidly enforced in the aid of the remedy for the mischief sought to be guarded against."

Passenger injured alighting from car — Corner stone in highway — Defect — Carrier not liable.

In *FARRINGTON v. BOSTON ELEVATED RY. CO.*, (Massachusetts, May, 1909) 88 N. E. 578, judgment was rendered for defendant on report from Superior Court, Suffolk county, in action for injuries to plaintiff while alighting from a street car, the verdict in that court being for plaintiff. HAMMOND, J., rendered the opinion, and after setting out the facts (plaintiff having slipped on a curbstone which had been constructed by the city) said:

"We are of opinion that a jury ought not to be allowed to find this corner stone, taken in connection with the surroundings, to be a defect in the highway. It is a very common construction where a sidewalk of any other reservation, elevated as this was above the rest of the street,

is crossed by a street or way, public or private. In the construction of a street it is good workmanship to have the sidewalk raised above that part of the surface of the street which lies next to the sidewalk, and speaking generally, such a method of constructing a sidewalk is almost universal. There must be some way of getting from one level to the other, when the continuity of the sidewalk or raised reservation is interrupted by cross streets: and the way adopted here is and for generations has been one of almost universal use. Upon the evidence it must be held as a matter of law that the way was not defective. *Burke v. Haverhill*, 187 Mass. 65, 72 N. E. 256, and cases cited. Compare, also *Raymond v. Lowell*, 6 Cush. 524, 532, 533.

"Nor is there any evidence of the negligence of the defendant. The car was stopped so that the plaintiff in alighting stepped upon a spot properly worked for public travel. It is to be noted that the street is in no sense a passenger station for the safety of which the defendant is responsible. The defendant had nothing to do with the construction of the street at the spot upon which the plaintiff testified she stepped. As a rule its duty, so far as material to the question under discussion, is met when it stops its car so that the passenger in alighting steps upon a part of the street properly worked for public travel. And such seems to have been the view of the presiding justice, for he instructed the jury that in order to bring in a verdict for the plaintiff they must find among other things not only that the place where the plaintiff alighted was dangerous but that it 'amounted to a defect in the highway.' This is not a case where by reason of changes in the surface of the street while undergoing repairs, or from some other cause, the street is temporarily defective and a passenger in alighting is likely to step on the defect. In such a case the defendant may be held to reasonable care, either by way of warning or otherwise, to see that the passenger safely alights. There was nothing in the appearance of the plaintiff to indicate to the conductor that she had not the ordinary capacity to care for herself, or that it would be any more dangerous for her to alight than for any other person. The defendant had the right to assume that the plaintiff knew generally of the construction of the sidewalks. There was no greater difference between the surface of this stone above the asphalt at the place upon which the plaintiff alighted than may occur between the level of two cobble stones. The injuries to the plaintiff were the result of turning her ankle. To require a street railway company to make so minute an examination of a properly worked street, as a decision for the plaintiff in this case would call for, would be to impose upon the defendant a burden at once unreasonable and practically impossible of performance."

Passenger alighting from car passing around rear of car and struck by another car — Carrier not liable.

In *COHEN v. BOSTON ELEVATED RY. CO.*, (*Massachusetts*, May, 1909) 88 N. E. 453, plaintiff's exceptions to verdict ordered for defendant in the Superior Court, Suffolk county, were overruled. The action was for injuries sustained by plaintiff after he had alighted from one of defendant's cars, he having passed around the rear of the car and attempted to cross the street when he

was struck by car coming in opposite direction. The court (per MORTON, J.) after stating the facts, said:

"We think that the plaintiff was not in the exercise of due care. To step onto a track at eleven or twelve o'clock at night in front of a rapidly approaching car which was a good distance away when he first saw it as he went round the rear of the car that he got off of and which had approached so rapidly that when he had passed over the few feet which separated the two tracks and had stepped onto the in-bound track it was only about sixty or seventy feet away, a little more than two car lengths as was said on the cross-examination, and then to proceed diagonally across the track with his back partially turned towards the approaching car without looking again because he did not think there was any danger, was an act of carelessness and not simply an error of judgment. He saw the car and knew that it was approaching rapidly, and the fact that the gong was not sounded could not, therefore, have affected his conduct. It is true that he could properly trust somewhat to the expectation that the motorman would exercise reasonable care, but it was near midnight, when the motorman could not be expected to see him and he was bound to take proper precautions himself for his own safety. *Tognazzi v. Milford, etc., St. Ry. Co., (Mass.) 86 N. E. 799.* We think that the case is governed by *Callaghan v. Boston Elev. Ry. Co., 200 Mass. 450, 86 N. E. 767*; *Casey v. Boston Elev. Ry., 197 Mass. 440, 83 N. E. 867*; *Madden v. Boston Elev. Ry., 194 Mass. 491, 80 N. E. 447*; *Holian v. Boston Elev. Ry., 194 Mass. 74, 80 N. E. 1*; *Fitzgerald v. Boston Elev. Ry. Co., 194 Mass. 242, 80 N. E. 224*; *Stackpole v. Boston Elev. Ry., 193 Mass. 562, 79 N. E. 740*; *Murphy v. Boston Elev. Ry., 188 Mass. 8, 73 N. E. 1018, 18 Am. Neg. Rep. 129*; *Mathes v. Lowell, etc., St. Ry., 177 Mass. 416, 59 N. E. 77.*"

Passenger with incumbrances alighting from moving car — Alighting place — Carrier not liable

In *SCHULTZ v. MICHIGAN UNITED RAILWAYS CO., (Michigan, December, 1909) 123 N. W. 594*, judgment for plaintiff in the Circuit Court, Calhoun county, was reversed. The facts are stated in the opinion by OSTRANDER, J., as follows:

"Plaintiff recovered a verdict and judgment for injuries sustained August 23, 1906, while she was a passenger on one of defendant's inter-urban cars in the city of Battle Creek. She boarded the car at the station of the company in the city to ride to a point in the outskirts of the city at the intersection of Marshall and Marjorie streets, where there is a waiting room maintained by defendant and a landing, at which defendant's cars usually stop upon request. The station is known as 'Postumville.' She was carrying a parasol and a flatiron holder. Testimony introduced in her behalf tends to prove that she paid the usual fare to the conductor, signified to him her desire to alight at Postumville, and received by word of mouth or otherwise the acknowledgment of the conductor that he understood her desire. She did not thereafter communicate with the conductor. It does not appear that he was near her, or that he saw her when she started to leave the car, or that the motorman knew of her desire to leave the car. She understood that the

car upon which she was riding was known as a limited car, had often ridden over this part of defendant's line, knew the cars made quick time — fast time — that they were heavy and operated by powerful motors, stopped quickly, and started quickly. The car was sixty feet in length, and it was stated at the argument that it weighed thirty-nine tons. She and her sister occupied the last seat in the car; the extreme rear of the car being occupied as a smoking compartment." * * *

After setting out plaintiff's testimony, the court continued: "The vestibule of the car was inclosed on three sides. Only the side on the south or station side of the car was open. The waiting room referred to was on the south side of Marshall street, in which defendant's track are laid, and to the east of it and connecting with the walk running north from the Postum Cereal Company's plant is a landing. The car was going east. There was an up grade east of the station. The car made no stop until it reached Marshall. Plaintiff's witness Martin testified that he saw plaintiff just after she struck the ground and went to assist her, that she got up without assistance, and that he should think she struck the ground about twenty feet east of the private walk which has been referred to. Frank Miller, a witness called for the defendant, testified that he was standing five feet east of the platform or landing; that he saw plaintiff on the platform of the car as the car passed and there were three or four men also on the platform; that she alighted or fell to the ground, and struck the ground about fifteen feet east from him. The sister of plaintiff rode on the car to Marshall, and did not know until the next day that plaintiff had been hurt. She testified that at the time the car passed Postumville the conductor was in the forward end of the car, kneeling down for some purpose; that she noticed the slackening of speed as the car approached the Postumville waiting room, noticed the increased speed; that the increase of speed was sudden, nearly jerking some packages which she had in her lap off her lap. To the west of Postumville station defendant's line is double tracked. Directly north of the landing which has been referred to and from thence east there is a single track; the switch points being substantially north of the centre of the landing. The car approached the station on the south track; its direction immediately north of the waiting room and landing being upon the curve to the north and to the single track." * * *

Continuing, the court said: "Confining discussion to the points made by appellant, we find the objection to the declaration to be that it does not state by what means the car was suddenly started. It is alleged that the defendant first slackened the speed of the car, and then carelessly and negligently suddenly started and moved the car forward with great, unnecessary and unreasonable force and swiftness. The consequences to the plaintiff of such movement, it being alleged that she was careful, are stated. The implication is that defendant's servant voluntarily controlled the movement of the car. The objection is without force.

"It is next contended there is no evidence of defendant's negligence, for which reason a verdict for defendant should have been directed by the court. This contention is, under the peculiar facts of the case, so intimately connected with the subject of plaintiff's negligence that the subjects may properly be considered together. It is clear that those operat-

ing this car did not intend to stop the car at Postumville. They did not operate it, and did not intend to operate it, so as to permit her to alight there. The reasonable, perhaps the necessary, inference to be drawn from the testimony, is that this car was in control of the motorman, was in proper running order upon a proper track, and that the increase of speed complained about was occasioned by the application of power. The movements of cars to and over switches are incidents of railway travel. It is neither negligent to decrease the speed of an electric car in approaching and passing a switch nor negligent to increase its speed after passing the switch by the application of power or the release of brakes, or both. Ordinarily such operation is regarded as prudent operation. Assuming that none of the passengers upon the car desired to alight at Postumville, the testimony wholly fails to show negligence in its management or its operation. It is only by assuming that because defendant owed to the plaintiff the contract duty to permit her to alight there and because her position in the car was due to reliance upon a performance of this duty, and the diminished speed, therefore the car was negligently operated, and therefore plaintiff was without fault. This assumption involves the duty of defendant in the exercise of due care to anticipate that plaintiff would leave her seat, as passengers often and perhaps commonly do, and approach the door of the car before arriving at the station. It is not claimed that any servant of defendant saw plaintiff during her passage from her seat to the door. Under the circumstances disclosed, it cannot be said as matter of law that in passing to the door while the car was in motion the plaintiff was negligent. *Bradley v. Railway Co.*, 94 Mich. 35, 38, 53 N. W. 915, 4 Am. Neg. Cas. 146; *Etson v. Ft. Wayne, etc., R. Co.*, 110 Mich. 494, 496, 68 N. W. 298. Neither should it be said that the operation of the car, otherwise proper, was negligent operation because plaintiff did leave her seat. She had the right to remain in her seat until the car had stopped. Defendant was not bound to take notice that she would do what her testimony disclosed she did do. If it were otherwise, the fact of prudent or imprudent operation of cars would depend upon the actions of those individuals who insist upon boarding and leaving a car before it arrives and without regard to the immediate presence or absence of those in charge of the vehicle. I am not able to distinguish the case in principle and *Etson v. Ft. Wayne, etc., R. Co.*, *supra*. In that case the car by a sudden acceleration of speed moved forward to its stopping place while plaintiff was in the position—out of his seat—assumed by him for the purpose of quickly alighting. In the case at bar, the car did not stop at the regular place for alighting, but, with an increase of speed, ran by the station. The judgment is reversed and a new trial granted. GRANT, HOOKER, McALVAY, BROOKE, JJ., concurred with OSTRANDER, J.

A dissenting opinion was rendered by MOORE, J., in which BLAIR, C. J., and MONTGOMERY, J., concurred.

Sudden start of car while passenger was alighting therefrom—Carrier liable—Damages.

In *HOSKOVEC v. OMAHA STREET RY. CO.*, (*Nebraska*, November, 1909) 123 N. W. 305, action for damages for injuries sustained by plaintiff while alighting from one of defendant's cars, judgment for plaintiff for \$12,750 in the

District Court, Douglas county, was *affirmed*. The opinion was delivered by REESE, Ch. J., the case being stated as follows:

"This is the second appeal in this case. The opinion on the former hearing is reported in 80 Neb. 784, 115 N. W. 312. The judgment of the district court upon that trial was in favor of defendant. The cause was remanded to the trial court, and, upon the last trial being had, the verdict of the jury was in favor of the plaintiff, upon which a judgment was rendered, and the cause is appealed by defendant.

"The case is elaborately briefed and has been ably argued at the bar of the court, the discussion covering a wide range of alleged errors; but it is thought the questions presented may be properly decided without an extended discussion of the propositions separately. As shown by the recitals contained in the former opinion, as well as by the record now before us, plaintiff was a passenger on one of defendant's street cars on the evening of September 22, 1902, and that in alighting from the car at the intersection of Thirteenth and Dodge streets in the city of Omaha she was thrown or fell upon the pavement and received serious and permanent injuries. There is little, if any, dispute as to the character or permanency of the results of the accident; but the main contention upon the trial was as to the manner in which the injuries were inflicted or received. It is alleged by plaintiff: That, as the car upon which she was a passenger was approaching Dodge street on Thirteenth, she informed the conductor that she desired to alight at Dodge street; that the car was stopped at the proper place for that purpose; that she stepped upon the running board at the side of the car, the car being an open one, and when the car stopped she caught hold of the stanchion, or appliance prepared for the purpose, with her left hand, with her face toward the front, and as she was in the act of stepping upon the pavement the car was given a sudden jerk forward in the act of being started, and she was thereby thrown upon the pavement and received the injury complained of; that the unexpected and negligent starting of the car by the employees of defendant was the cause of the accident. Plaintiff's testimony supported these allegations. She fell upon her face, striking her chin: the most serious injury being the dislocation of her under jaw upon the right side. Her chin showed the force of her fall, as there was a bruise and abrasion thereon. There were other minor injuries inflicted upon other portions of her body. The defendant insists that, upon arising to step off the car, she, without waiting for the car to stop, took hold of the support with her right hand, and with her face to the rear stepped off, and that her fall was the result of her own negligence in so alighting before the car was brought to a stop and by stepping off with her face to the rear, instead of the front, as she should have done. This contention of defendant was supported by the conductor of the car and three passengers. It will be seen that there was a sharp conflict in the evidence."

* * *

The points decided are stated in the syllabus of the case by the court as follows:

"1. Questions of fact on conflicting evidence are for the determination of the jury.

"2. Where the evidence is conflicting, it is within the province of the jury sitting at the trial to consider all proved physical facts and con-

ditions attending the main facts for the purpose of arriving at the true solution of the question presented. They are not bound by the number of witnesses testifying if in the exercise of reasonable judgment they are convinced that the truth is shown by the side producing the smaller number of witnesses.

"3. A witness was called by plaintiff whose testimony supported the theory of plaintiff. On a subsequent trial her testimony was directly opposite that previously given by her and sustained the theory of the defense. At the time of the trial from which this appeal is taken she was not within the jurisdiction of the court, and plaintiff read her testimony given in the first instance, including her cross-examination by defendant. The cross-examination and re-examination took a wide range, including statements the witness was claimed to have made to an agent of defendant, and tended to show that by improper solicitation the agent had sought to persuade her to change her version of the transaction constituting plaintiff's cause of action. The reading of a part of the cross-examination and all of the re-examination was objected to and the objection overruled. During the presentation of defendant's evidence it introduced and read the contradicting testimony of the witness given upon the later trial. *Held*: First, that the ruling of the court permitting the cross-examination to be read was not such error as would call for the reversal of the judgment; and, second, that the introduction of the testimony given during the later trial rendered the reading of the cross-examination and re-examination admissible, and that, having been introduced out of its proper order, although irregular, was not reversible error.

"4. The admission of irrelevant evidence, which could have no bearing or effect upon the issues in the case, while erroneous, but without benefit to either party, will not require the reversal of a judgment.

"5. Instructions given and refused, set out in the opinion, *held* not to be erroneous.

"6. The giving or refusing to give cautionary instructions, such as that the jury are not to allow their sympathy for either party to control or affect their finding, to some extent is within the discretion of the presiding judge, depending upon the exigencies of each particular case. The refusal to give such an instruction will not, usually, require the reversal of a judgment; there being no question of law presented thereby.

"7. Plaintiff received the personal injury complained of in the suit when she was twenty-two years of age. From that time until the trial of the cause, six years thereafter, she suffered continually from the effects of the injury. Her mental and physical faculties were impaired. She had at no time been able to engage in her usual avocations, and during portions of the time she was unable to care for herself. The undisputed and convincing evidence was that no recovery could follow, but that she was thus injured for life. *Held*, that the sum of \$12,750, which included medical attendance, was no more than compensatory."

FAWCETT, J., in *dissenting*, said: "I am unable to concur in the third paragraph of the syllabus, or in the reasoning of the opinion in support thereof." LETTON, J., agreed with FAWCETT, J.

J. W. CONNELL and J. L. WEBSTER appeared for appellant; WEAVER & GILLER and FRANK T. RANSOM, for appellee.

Passenger injured while alighting from car — Sudden jerk of car — Carrier liable.

In *MCCULLOM v. ATLANTIC CITY & SHORE R. R. Co.*, (*New Jersey Errors & Appeals*, March, 1909) 72 Atl. 87, action for injuries sustained by plaintiff while alighting from one of defendant's cars, judgment for plaintiff was *affirmed*. Opinion by MINTURN, J. The syllabus of the case by the court is as follows:

"1. Whether a passenger upon a trolley car, who has signaled to the conductor to stop, is guilty of contributory negligence in stepping upon the running board of the car before the car has stopped, preparatory to alighting therefrom, is, where the facts are in dispute, a question for the jury, and is not *per se* negligent.

"2. Whether the motorman exercised the care required by law, when a passenger was attempting to alight and was thrown, as she alleged, by a jerk or lurch of the car, is a question for the jury, where the facts are disputed. BERGEN, J., *dissenting*.

Passing behind car after alighting therefrom and struck by fender — Carrier not liable.

In *WHILT v. PUBLIC SERVICE CORPORATION OF NEW JERSEY*, (*New Jersey Errors & Appeals*, November, 1908) 72 Atl. 420, judgment for defendant was *affirmed*. Opinion by BERGEN, J. The syllabus by the court states the case as follows:

"The plaintiff was a passenger on a trolley car, from which it was necessary that he should transfer to another belonging to the same carrier, in order to reach his destination. He alighted from the first car, at the usual point of transfer, and immediately started to pass in the rear of the car, and in doing so fell into the rear fender, which was down, and was injured. It appeared that the usual custom of the company was to have the rear fender fastened up. *Held*, that while, in passing from one car to another, the plaintiff continued to be a passenger of the defendant company, no inference of negligence on the part of the defendant could be drawn from the fact that the car was being run with the rear fender down."

[On this point see *Walger v. Jersey City, H. & P. St. Ry. Co.*, 71 N. J. Law, 356, 17 Am. Neg. Rep. 322, 59 Atl. 14.]

In the course of the opinion BERGEN, J., said:

"On a previous trial of this cause there was a verdict for plaintiff, which was set aside by the Supreme Court on rule to show cause, and a new trial ordered (*WHILT v. PUBLIC SERVICE CORP.*, 74 N. J. Law, 141, 64 Atl. 972); and it was there held that the fact that the fender was down, contrary to the usual custom, was not sufficient to justify an inference of negligence; that whether the street railway company should have a fender at one end only, or at both, was a matter of detail in the construction of its cars, which ought to be left to the reasonable judgment of the managers, and, while proof that it was usual to have the fender up would have an important bearing upon the question of the care exercised by the plaintiff, it was not sufficient to justify an inference of negligence on the part of the defendant; that to hold that a change in the method of carrying fenders on a street car justified an inference of negligence would subject the defendant to the peril of being held negligent whenever it made an im-

provement in the construction of its cars. This conclusion is supported, so far, at least, as it relates to persons not passengers of the company, by *Gargan v. West End R. R. Co.*, 176 Mass. 106, 57 N. E. 217. The case presented on rule to show cause was determined upon the status of the plaintiff as a pedestrian using the highway, and not as a passenger, to whom a higher degree and a different sort of care might be due."

Passenger injured alighting from open car — Defect in highway — Carrier not liable.

In *SLIGO v. PHILADELPHIA RAPID TRANSIT CO.*, (*Pennsylvania*, March, 1909) 73 Atl. 211, action for damages for injuries sustained by plaintiff while alighting from one of defendant's open summer cars, judgment for defendant in the Court of Common Pleas, Philadelphia county, was *affirmed* (MESTREZAT, J., *dissenting*) The judgment of affirmance (per ELKIN, J.) is as follows:

"The learned trial judge submitted this case to the jury, which, after long deliberation, reported a disagreement, whereupon a verdict for defendant was directed and judgment entered thereon.

"It is clear as indicated by the course of the trial, that the learned court in the first instance entertained some doubt as to the liability of the defendant, but, after more mature deliberation, concluded that there could be no recovery under the facts and rules of law applicable thereto. The accident occurred on the old York road, upon which is laid a street railway line with the consent of the municipality. This road is of the general character of a country highway with the usual ditches, banks, crossings, drains, and culverts necessary or convenient to the maintenance of such a highway. At the point where Eckert avenue intersects with York road, a somewhat temporary sort of a bridge made of planks had been constructed over the gutter, thus affording a passageway for vehicles and travelers using the highways. The street railway had nothing to do with construction or maintenance of the highways or the so-called bridge in question. It happened that the avenue was wider than the bridge was long, but the public authorities were responsible for this situation, and it was not either the right or the duty of the street railway company to exercise any control over the highways, nor did the burden rest upon it to furnish a different kind of bridge, or platform or landing place at that point. When municipal consent was obtained to lay the tracks of the street railway upon the public road, it became the duty of the railway company to conform its line to the established grade of the highway and to adjust its operation to the conditions existing on the ground. This eliminates from the case all questions as to the construction of said approaches or places to alight. No such duty rested upon the appellee company at the point of accident.

"As to the questions whether the car was stopped at a proper place, and whether notice should have been given the passenger before alighting, we agree that the case at bar is ruled by *Mahoney v. Rapid Transit Co.*, 214 Pa. St. 180, 63 Atl. 429. The cases are almost parallel in their facts, and to distinguish them in principle would require a refinement too technical to have any force in the practical application of the law. The injured passenger was riding in an open summer car with a running board on either side. On one side of the track was a broad,

smooth, level, macadam surface, and on the other side there was a little depression in the nature of a roadside ditch used for drainage purposes. It was made by grading the roadway under municipal regulation from the traveled part of the highway to the outer side of the same and was of the general character of the ditches or gutters alongside of country roads. Passengers on the street railway could alight on either side of the car, and in alighting could step down on the level macadam road on one side or on the receding gutter side on the other. In the present case the complaining passenger stepped off on the gutter side, and in so doing, the step being a little high, she lost her balance and fell, thus receiving the injuries for which damages are sought to be recovered in this action. The accident occurred on a May evening, in the twilight. The weight of evidence shows that it occurred from seven to 7:15 o'clock in the evening, although the injured lady said it was later. The car had not yet been lighted, and one of the witnesses testified it was light enough to read a newspaper. Under these circumstances, we think this case is squarely ruled by the Mahoney Case above cited. Judgment affirmed."

Alighting from street car — Contributory negligence.

In *NORTON ET AL. v. COLUMBIA ELECTRIC STREET RAILWAY, LIGHT & POWER Co.*, (South Carolina, June, 1909) 64 S. E. 962, action for damages for injuries sustained by plaintiff while alighting from one of defendant's cars, it being alleged that the car was started without warning whereby plaintiff was thrown from car, judgment for defendant in the Common Pleas Circuit Court of Richland county, was *affirmed*, contributory negligence being shown. Opinion by GARY, A. J.

Passenger injured alighting from car — Projecting object on step of car — Carrier liable.

In *DALLAS CONSOLIDATED ELECTRIC STREET RY. Co. v. CHASE*, (Texas Civil Appeals, April, 1909) 118 S. W. 783, judgment for plaintiff for \$1,500 in the District Court, Dallas county, was *affirmed*, the case being stated in the opinion by RAINEY, C. J., as follows:

"This suit was brought by appellee to recover of appellant damages on account of personal injuries sustained by him while he was attempting to alight from one of appellant's cars. The petition alleged, among other things, that defendant was duly incorporated under the laws of Texas; that, while he was a passenger on one of the defendant's cars, he gave the defendant notice that he wished to alight therefrom, and thereupon said car checked its speed, and plaintiff went to the rear platform to alight from said car and as the car had passed the usual and customary place for alighting at Harwood street and as the speed of the car had been checked, and believing the conductor's signal indicated that he should get off, plaintiff proceeded to alight from said car while it was going at a slow rate of speed, but, as he was in the act of alighting, some projection on the step of the car was caught in the hem of plaintiff's pants, whereby he was hung as he was alighting, and violently thrown to the ground, and crippled, bruised, and injured, which said injuries were more specifically set out in the petition; that the projection, the nature and character of which plaintiff had no means of knowing, and which he

had not discovered, was negligently left on said step and made same unsafe for passengers, and said negligence on the part of defendant was the direct and proximate cause of the injuries received by plaintiff.' The defendant answered by general denial and plea of contributory negligence. A trial resulted in a verdict and judgment for plaintiff in the sum of \$1,500. The allegations of plaintiff's petition were supported by the evidence, and the jury were warranted thereby to render a verdict for him." * * *

Rehearing denied, May 1, 1909.

Alighting from car — Sudden start of car.

In *THOMPSON v. NORFOLK & PORTSMOUTH TRACTION CO.*, (Virginia, June, 1909) 64 S. E. 953, judgment for defendant was *reversed*, the opinion by KEITH, P., stating the case as follows:

"Mrs. Virginia D. Thompson brought suit in the court of law and chancery of the city of Norfolk to recover damages for injuries received by reason of the negligence of the Norfolk & Portsmouth Traction Company. Upon the trial the jury found a verdict in her favor for \$3,000, which the court set aside, and at a subsequent trial, neither party offering any testimony, a judgment was entered for the defendant. The record of the first trial is preserved by proper bills of exceptions, and the case is before us upon a writ of error.

"Mrs. Thompson was a passenger on a car of the Norfolk & Portsmouth Traction Company, and her account of the occurrence is that: She rang the bell to stop the car, intending to alight at Madison street, but her signal was not obeyed, and she waved her hand to the conductor, and the car was brought to a standstill. She arose from her seat while the car was in motion and had gotten to the door when the car stopped, and she then stepped upon the platform. There was at the time no one upon the platform but herself and the conductor. Her statement of what then occurred is as follows: 'I was holding onto the rail that goes down from the car and I had hold of this with my right hand, and in attempting to alight from the car on the street I had one foot — say the platform is here, in attempting to put the other foot on the street, the car threw me suddenly, and it broke this arm, but I did not know it was hurt.' She then goes on to describe with more particularity the injuries which she received, with respect to which it is sufficient to say that they were of such a character that we are unable to say that the verdict was excessive in amount. Her statement is corroborated by the testimony of her granddaughter, a child ten years of age, but who was not objected to as a witness. Mr. and Mrs. Childress also testify that they saw Mrs. Thompson come out on the end of the car, that she had hold of the railing and was about to step off, and just before she got her other foot upon the ground the car started and threw her.

"Five disinterested witnesses, who were passengers upon the car at the time of the accident, testify in behalf of the defendant company. Their testimony is in conflict with that of the plaintiff in error.

"There was no exception taken to the instructions given by the court to the jury. The question for decision therefore is purely one of fact."

* * *

"This case seems to be very similar to that of *Morien v. Norfolk & Atlantic Terminal Co.*, 102 Va. 622, 46 S. E. 907, in which Judge Harrison says: 'The contention of the defendant company is that the injury sustained by the plaintiff was the result of her own negligence in alighting from the car while it was in motion and slowing down to stop. The clearly defined issue of fact therefore submitted to the jury was, had the car stopped, or was it still moving when the plaintiff attempted to alight? The evidence on behalf of the plaintiff, if the jury believed it, fully sustained her contention that the car had stopped, and the evidence of the defendant was ample, if the jury believed that, to sustain its contention that the car was still in motion when the plaintiff attempted to alight. The jury accepted as true the evidence on behalf of the plaintiff and returned a verdict in accordance therewith.' * * *

"We are of opinion that the court of law and chancery should be reversed, and this court will proceed to enter a judgment in accordance with this opinion."

Sudden start of car while passenger was alighting therefrom — Carrier not liable.

In *GRADY v. ST. LOUIS TRANSIT CO.*, (*U. S. Circuit Court of Appeals*, Eighth Circuit, April, 1909) 169 Fed 400, judgment of the Circuit Court for the Eastern District of Missouri for defendant in action brought by plaintiff for injuries alleged to have been sustained by him while alighting from one of defendant's street cars was *affirmed*. Opinion by RINER, District Judge. It was held that there was no error in admitting in evidence certain city ordinances requiring stopping of cars on the "far" side of intersecting streets; nor was there error in admitting evidence in regard to the rules of the defendant regulating the crossing of other car lines at the intersection of streets. Where plaintiff charged in his petition that the car stopped, that while it was standing still he attempted to alight, and that before he could do so the car was started with a sudden jerk and threw him to the ground, and there was no other evidence tending to show that plaintiff was injured by the sudden increase of speed or by a sudden jolt or movement of a moving car while he was in the act of alighting, a request to charge that if the car had slowed down and plaintiff, having reasonable ground to believe that the car had stopped or was about to stop, attempted to alight, when it started again and in so starting the car defendants servants failed to exercise the highest degree of care, the jury should find for plaintiff, was properly refused because no such issue was presented or tried.

Alighting from trains.

Passenger injured while alighting from train — Lights at station — Incompetency — Evidence.

In *LOUISVILLE & NASHVILLE R. R. CO. v. PAYNE*, (*Kentucky*, April, 1909) 118 S. W. 352, action for damages for injuries sustained while alighting from a train, judgment for plaintiff for \$1,000 in the Circuit Court, Marion county, was *reversed*, for errors in admission of certain evidence, for misconduct of plaintiff's counsel, and for errors in instructing the jury. LASSING, J., in rendering the opinion, said:

"The incompetent evidence complained of as prejudicial is this: Plain-

tiff was permitted to prove, over the objection of defendant, the extent of its freight business, which was conducted at its freight depot on the south side of the main track; also that the local agent and his assistants had an office at the freight depot, where the freight business of defendant company was transacted. The evident purpose of this testimony was to establish in the plaintiff a right to alight from the train on that side rather than on the north side of the track, or rather to excuse him from being negligent in so doing. Plaintiff was a passenger, and, so far as the record shows, had no business to transact at the freight office, and no occasion to go there, for it does not appear that he knew of the existence of the freight depot on that side of the track. It was about ten o'clock at night when the train reached the station, and the freight depot was then closed. The approach of the train to the depot had been properly announced, and the way from the train to the platform was lighted by the brakeman, who had a lantern to light the way if additional light was needed. This evidence did not tend in the least to throw any light upon the manner in which plaintiff was injured, and could serve no purpose other than to confuse the minds of the jury.

"Again, plaintiff introduced, over the objection of the defendant, evidence as to what lights were maintained at the depot. It is unquestionably the duty of the railroad company to keep its depot platform and approaches thereto properly lighted, so as to afford passengers an opportunity to pass safely to and from the train; and a failure to have the platform and the approaches thereto lighted would render the company liable in damages to one injured as a direct result of such neglect. But the negligence complained of and relied upon in this case was the sudden starting of the train; and, having specified the particular act of negligence relied upon, plaintiff cannot recover by showing other acts of negligence. No claim is made in the pleadings that the platform was not sufficiently lighted, or because of insufficient lights plaintiff could not see where or how to go, but the sole ground relied upon is that the train started with a sudden jerk and threw him to the ground and under the wheels, to his injury. This evidence, not bearing upon the issue made by the pleadings, was incompetent, and should not have been admitted, and this is especially true as to the evidence of the witness Hagan, who testified that he did not come to Lebanon until in the spring of 1906, and, of course, could know nothing of the way and extent to which the platform was lighted in the summer of 1905, when the accident occurred. He knew nothing of how the platform was lighted at the time of the injury, and could not testify upon this point even if this character of testimony was permissible. All incompetent evidence is not prejudicial to such an extent as to warrant a reversal; but, where the ground relied upon for a recovery is the commission of a negligent act in one respect, it is prejudicial to permit evidence tending to establish another and different negligent act to go to the jury, for the jury would no doubt receive the evidence tending to establish the latter act as having some important bearing upon the act of negligence charged, and hence such evidence would be prejudicial." * * *

See also, former appeal in the *PAYNE* case, 104 S. W. 752, where the facts are fully stated.

Alighting from moving train — Direction to alight — Evidence — Carrier not liable.

IN *POWERS v. CHICAGO, MILWAUKEE & ST. PAUL RY. Co.*, (Minnesota, July 1909) 121 N. W. 897, judgment for defendant in the District Court, Wabasha county, was *affirmed*, the court (per START, C. J.,) stating the case as follows:

The basis of the plaintiff's cause of action as alleged in her complaint is that the defendant negligently directed her to alight from the moving train, which by reason of such direction she believed had stopped, and in attempting so to do she was injured. The only question for our consideration is whether the evidence, taking the most favorable view of it for the plaintiff, fairly tends to establish the allegation of the complaint that defendant directed the plaintiff to get off the train when it was moving.

"The most favorable evidence for the plaintiff is her own testimony, which, so far as it related to the issue whether the defendant directed her to get off the train when it was in motion, was as follows: 'Q. What did he [the porter] do, if anything? A. Well, he walked down the aisle past us and opened the door, and I thought the train had stopped, and I walked down to the door and asked him — Q. No; what did he do after he opened the door, or say A. Well, he called "Lake City." Q. And he opened that door onto the platform of the car and called "Lake City?" A. Yes. Q. What did you do? A. Well, I got up. Q. Right away? A. Yes; I got up right away I thought that — Q. How long, if any, time elapsed between the time he called "Lake City" and the time when you got up? A. Well, I don't think there was very many minutes. It wasn't very long from the time he called "Lake City" until I got up from my seat. I had a grip. I carried that down to the door, and I asked him which side I would get off at, and he put his hand and directed me the side to get off. * * * Q. How did he direct you? A. Well, he motioned with his hand which side I should get off at. Q. To which side did he motion with his hand? A. The depot side. * * * Q. What did you do? A. I went right off; went down and stepped off. Q. Where was he when you stepped off? A. He was standing at the door when I stepped out of the car. Of course, I don't know how long he stayed there. Q. Where was he standing when he motioned his hand in response to your question? A. Right opposite the door. Q. Had the train stopped, or was it still going? A. The train was still going, but I could not tell that it was going. It was moving very slowly and very smooth. * * * Q. Did you say you thought it had stopped? A. I thought it had stopped, certainly.'

"It is the claim of plaintiff's counsel that it was the province of the jury to determine whether the words and acts of the porter imported a direction to get off the train before it stopped. Such would be the case, if his words and acts were fairly susceptible of more than one meaning; but it is clear from her testimony that the porter did not direct her to then get off the moving car. To the specific question of her counsel, 'How did he direct you?' she answered, 'Well, he motioned with his hand which side I should get off at.' This answer makes it clear that by the word 'directed,' in her previous answer, she meant that he motioned to her the side to get off. The acts and words of the porter in answering

the plaintiff cannot reasonably be construed as a direction or suggestion, express or implied, to her to get off the train when it was in motion."

* * *

Evidence held insufficient to justify finding of negligence against defendant as alleged in complaint.

Alighting from train — Invitation — Failure to stop train a reasonable time — Carrier liable.

In *YAZOO & MISSISSIPPI VALLEY R. R. CO. v. BEATTIE*, (*Mississippi*, April, 1909) 49 So. Rep. 609, action for damages for injuries sustained by plaintiff while alighting from one of defendant's trains, judgment for plaintiff for \$2,500 in the Circuit Court, Yazoo county, was *affirmed*. The opinion by CALHOON, J., states the case as follows:

"It was the duty of the railroad company to stop its trains at its regular stations for trains, and to stop reasonably long enough for its passengers with tickets to their destination to alight. This duty is of great importance to the safety and convenience of the traveling public. Not to do so is gross negligence. In the case at bar it did not stop at all, or, if it did, it stopped only for a moment. The preponderance of evidence is that it 'slowed down' to nearly a stop; that the porter called to the passengers, 'All out for Bentonina;' that the passengers arose from their seats and moved towards the door for exit; and that plaintiff, the third from the front, in the movement, under pressure of others in her rear, went onto the platform, and on the steps of the car, and on calls of 'Get off; get off; fall off; fall off!' and to escape falling, and perhaps getting under the wheels from the pressure, jumped and was thrown against a box car and very seriously injured for life.

"It was properly left to the jury to say whether people of ordinary prudence would have done as she did under the invitation and under the circumstances surrounding her. It was for the jury to determine from all the evidence whether the jump was or was not manifestly dangerous in itself to the minds of ordinarily prudent people in her situation. Juries know, and a railway company knows, that prudent people arise and move to the doors when their station is announced; and this jury knew from the evidence that, if the company had done its plain duty and made a proper stop, no accident would have occurred. It follows that the verdict is not to be disturbed on this phase of this case.

"If it can be said that any fact can be established by human testimony, it is proved here that this woman was severely injured, and injured for life, with an entailment of continual suffering and distress, and that, as its result, she has almost certainly but a few months longer to live. So we do not think the damages awarded in any degree excessive."

Passenger injured by sudden start of train while alighting therefrom — Ice on car steps — Damages.

In *VAN CLEVE v. ST. LOUIS, MEMPHIS & SOUTHEASTERN RY. CO.*, (*Missouri Appeals, St. Louis*, April, 1909) 118 S. W. 116, judgment for plaintiff in the Circuit Court, Pemiscot county, for \$4,500 was *affirmed*, the case being stated in the opinion by NORTON, J., as follows:

"This is a suit for damages alleged to have accrued to the plaintiff

from personal injuries received by her while a passenger alighting from defendant's train. Plaintiff recovered, and defendant prosecutes the appeal.

"The evidence tends to prove the plaintiff was a passenger on the defendant's mixed train. She boarded the train at Yarbrow, Ark., destined to Caruthersville, Mo., and paid the usual fare to the conductor. She was injured while in the act of alighting from the defendant's passenger coach at the depot at Caruthersville, because of a sudden jerk of the train, which precipitated her from the steps of the coach against the depot platform. It appears the train had stopped at the defendant's depot at Caruthersville, and the defendant's conductor and brakeman in charge thereof had invited the passengers to alight therefrom. The date of the injury was November 19th. Rain had fallen during the day, and by reason thereof mud had accumulated on the steps of the passenger coach from the shoes of those passing in and out. This had slightly frozen and was slippery. While plaintiff was in the act of alighting from the passenger coach, with her grip in her hand, and while she was upon the steps thereof, the train was suddenly jerked by a movement of the locomotive, which caused her to slip on the mud and ice accumulated on the car steps and fall, striking her breast against the platform of the depot, her limbs passing down between the depot platform and the car steps. She was immediately taken up by bystanders and carried into the depot waiting room, where she had a hemorrhage from the lungs. Afterwards she was carried to the hotel at Caruthersville, where she was confined to her bed for about eight days, and suffered frequent recurring hemorrhages. It appears that four or five weeks elapsed before she was able to perform any kind of service, and then she could only do a slight amount of housework each day. From the testimony of the physician who attended her it appears the fifth rib on the left side was broken near the breastbone, and probably inflicted an injury to the left lung. Numerous witnesses gave testimony to the effect that prior to her injury plaintiff was a strong, robust woman, in good health, of about 158 pounds in weight, and that she had never had a hemorrhage of the lungs prior to that time. It appears she had continued to suffer ever since the injury from hemorrhages of the lungs, and had depreciated from 158 to 130 pounds in weight; that tuberculosis of the lungs set in immediately after the injury, and has continued ever since. If the testimony of her witnesses, together with the inferences arising therefrom, are to be taken as true, plaintiff has been a great and continued sufferer since she was injured, and is now far advanced in the throes of consumption, resulting from a traumatic injury to the lung received from her fall against the depot platform. There was evidence on the part of the defendant that the train was not jerked or started at all while plaintiff was in the act of alighting therefrom, and that she received her fall from no other cause than slipping on the steps of the coach, or an accident. There was also expert testimony on the part of defendant to the effect that the plaintiff was not afflicted with consumption, and one witness said she had stated to him that she had had hemorrhages even prior to the time of her injury. However this may be, all of the testimony on either side tends to show the fall and resultant injury while in the act of passing from the de-

fendant's coach to the defendant's depot platform, and that she was seized immediately with a hemorrhage of the lungs while in the waiting room of the depot. And, further, that she has continued to suffer from like hemorrhages ever since." * * *

"The jury awarded plaintiff a verdict of \$5,000. Upon the hearing of the motion for a new trial plaintiff voluntarily entered a remittitur to the extent of \$500, and the court entered judgment for plaintiff for \$4,500. We are asked to set aside this verdict on the ground that it is excessive. Besides the facts heretofore recited touching the injury, and that it resulted in entailing or developing consumption from a latent germ in the system, the evidence tended to show the plaintiff was a woman thirty-six years of age at the time of her injury, enjoying good health and strength. It appears she has paid between \$200 and \$300 for medicines and medical aid and attention. She is now worn and emaciated, has suffered, and continues to suffer, great pain, and is now in a well-advanced stage of tuberculosis. Her injuries are permanent, of course. It is immaterial what the testimony on the part of the defendant may show. The question was for the jury. If the jury believed the plaintiff and her witnesses, as it evidently did, the verdict is not at all excessive. There is certainly nothing in the record to indicate that the verdict was the result of either passion, prejudice, or misconduct. In view of these facts, the verdict is certainly not excessive." * * *

See, also former appeal, 124 Mo. App. 224, 101 S. W. 632.

Passenger getting ready to alight injured by sudden jerk of train — Carrier liable.

In *DAVIS v. ATLANTA & CHARLOTTE AIR LINE RY. CO.*, (South Carolina, June, 1909) 64 S. E. 1015, judgment for plaintiff in the Common Pleas Circuit Court was *affirmed*. the opinion by Woods, J., stating the case as follows:

"The plaintiff, Lula H. Davis, as administratrix, brought this action against the Atlanta & Charlotte Air Line Railway Company for the alleged killing of her husband, John W. Davis. There was evidence tending to prove: That on 22d September, 1905, Davis was a passenger on defendant's train between Easley and Beverly, having paid his fare to the latter place, which is a flag station; that, on drawing near to Beverly, the train blew the usual stop signal and slowed down; that deceased went to the back platform and down on the steps in order to alight; that, instead of stopping, the train's speed was quickened; and that thereupon deceased attempted either to re-enter the coach or to pass to the other side of the platform, when a sudden jerk of the cars threw him off, and he sustained a fatal injury.

"On the trial of the cause motions for a nonsuit and for a new trial were overruled by the presiding judge. The five grounds urged in favor of these motions present two questions for the consideration of this court: 1. Was there any evidence of negligence of defendant which was a proximate cause of the injury? 2. Did the evidence admit of no other inference than that the plaintiff was guilty of contributory negligence?

"The fact that the train failed to stop at the station to which testimony tended to show the deceased had paid his fare was evidence of negli-

gence on the part of the carrier (*Cooper v. Railway Co.*, 56 S. C. 91, 34 S. E. 16), and added to this is the presumption that the injury to plaintiff as a passenger was due to the carrier's negligence (*Cooper v. Railway Co.*, 61 S. C. 345, 39 S. E. 543; *Steele v. Railway Co.*, 55 S. C. 389, 33 S. E. 509, 6 Am. Neg. Rep. 695; *Zemp v. Railway Co.*, 9 Rich. Law, 89, 10 Am. Neg. Cas. 225). On this evidence of carrier's negligence, the question of proximate cause was properly submitted to the jury. *Doolittle v. Railway Co.*, 62 S. C. 130, 40 S. E. 133.

"The rule is established in this State by the case of *Zemp v. Railway Co.*, 9 Rich. Law, 89, 10 Am. Neg. Cas. 225, that it is not contributory negligence *per se* for a passenger to go on the platform of a train for the purpose of alighting, having reason to believe that the train is about to stop at his station. It follows from the evidence above stated that the issue of contributory negligence was properly submitted to the jury.

"The judgment of this court is that the judgment of the Circuit Court be affirmed."

Passenger injured alighting from train — Presumption of negligence — Erroneous instructions.

In *BROWN v. ATLANTIC COAST LINE R. R. Co.*, (*South Carolina*, June, 1909) 64 S. E. 1012, action for damages for injuries sustained while alighting from one of defendant's trains, judgment for plaintiff for \$1,000 in the Richland County Court, was reversed for errors in instructions. GARY, A. J., in his opinion, said:

"The first assignment of error is, because his honor the presiding judge charged the jury that 'when a passenger is hurt, the presumption of law is that it is through the negligence of the railroad company, but the presumption may be done away with by proof.' The rule is thus stated in *Anderson v. R. R. Co.*, 77 S. C. 434, 58 S. E. 149. 'The third exception complains of error in charging: "That the obligation of a common carrier for safe transportation is one arising from contract imposing duties growing out of the relation between the parties involving trust and confidence, requiring extraordinary care; and, whenever a passenger is injured on a train, without fault on his part, while being transported by a carrier, a presumption arises from this fact alone that there was negligence in the management of the road, which presumption the carrier is bound to rebut, or it will be liable in damages without further proof" — the error being that no presumption of negligence can arise from the mere injury of a passenger, unless it is shown that the injury was caused by some instrumentality in the charge of, or under the control of, the carrier, and that some notice of the threatened violence or impending danger must be brought home to the carrier before negligence can be imputed. This exception is well taken. According to the rule in this State there is no presumption of negligence on the part of the carrier from the bare fact that a passenger has been injured while on the carrier's train, but that such presumption does arise on proof of such injury as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation.' The testimony was contradictory as to the manner in which the plaintiff was injured. He intro-

duced evidence tending to show that he was injured as alleged in his complaint, while the defendant's testimony tended to show that he suffered injury by jumping from the car before it reached the station, and while it was in motion. The charge gave the plaintiff the benefit of a fact to which he was not entitled, and which was prejudicial to the rights of the appellant. The exceptions raising this question are sustained." * * *

Not contributory negligence per se to alight from slowly moving train but question for jury.

In *SEVIER v. SOUTHERN RY. CO.*, (*South Carolina*, April, 1909) 64 S. E. 390, action for damages for injuries sustained by plaintiff while alighting from one of defendant's trains, judgment in the Common Pleas Circuit Court of Greenville county for plaintiff for \$500 was *affirmed*. It was held that it is not contributory negligence in law to alight from a slowly moving train, and whether a person is guilty of contributory negligence in thus alighting is for the jury to determine from the evidence. Opinion by JONES, J.

Aged person injured alighting from train — Failure to furnish footstool for assistance — Carrier liable.

In *WEATHERFORD, MINERAL WELLS & NORTHWESTERN R. R. CO. ET AL. v. WHITE*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 799, judgment for plaintiff in the District Court, Palo Pinto county, was *affirmed*, the facts being stated (opinion by LEVY, J.) as follows:

"By her petition the appellee sought to recover damages for personal injuries received while a passenger disembarking from the passenger train of the appellant, claimed to have been occasioned to her by the negligent failure of the appellant to furnish and provide a stepstool for her assistance, and in failing to render her personal assistance in her descent from the bottom step of the car to the platform, a distance of about thirty inches, at the station of her destination; she being an old and feeble lady and of weak eyesight, which fact was known to the employees of appellant in charge of the train at the time. The appellant answered by general denial and contributory negligence. The case was tried to a jury, and in accordance with their verdict a judgment was rendered in favor of the appellee.

"Without setting out the evidence in detail, substantially it shows that the appellee, a woman seventy years old and with weak eyesight, was a passenger on the appellant's passenger train for her home at Mineral Wells, Tex. When the train stopped at its regular station at Mineral Wells, the passengers hereon proceeded to alight from its several coaches; the conductor assisting the passengers to alight at one coach, and the porter at another coach. The coach the appellee was riding in was a vestibule coach, and occupied the third place from the front of the train. When the train stopped the appellee followed a part of the crowd of passengers in front of her to the rear end of the car she was riding in; a fellow passenger carrying her grip. The rear door of the vestibule car she was riding in was open, and she, on reaching its platform, proceeded to alight from the same. The porter of the train was standing in about six or eight feet of the platform appellee was then on and at the steps of the next car behind the car she was alighting from, and the porter saw

her alighting. After reaching the bottom step of the platform of the car, the appellee proceeded to make the descent therefrom to the platform of the station, which was the ground, prepared and used by the appellant as the place for its passengers to alight. In making the descent from the bottom step of the car to the ground, and by reason of the distance of this step of the car to the ground, which was not known or appreciated by the appellee at the time, and there being no stepstool, she was overbalanced, and as her foot reached the ground it careened under the weight of her body and threw her forward to the ground. All the evidence agrees with the testimony of the conductor and porter that 'there was no footstool at the place she fell,' and that no employee was there to or did assist her in alighting from the car. By her fall to the ground, and as a result thereof, appellee suffered serious injury to her hip and leg. The jury found on these facts in favor of the appellee, and we think the evidence sufficient to sustain their verdict and to warrant the finding which we make, that the appellant was guilty of negligence toward the appellee, as claimed in the petition, proximately causing her injury, and that appellee was not guilty of contributory negligence, and that the evidence supports the verdict as to the amount of damages allowed her, except as to the medical and medicine bills claimed in the petition." * * *

Rehearing denied, April 29, 1909.

Passenger, with incumbrances, injured while alighting from train—Carrier not liable.

In *SOUTHWORTH v. PECOS & NORTHERN TEXAS RY. CO.*, (*Texas Civil Appeals*, April, 1909) 118 S W 861, judgment for defendant railway in the District Court, Potter county, was *affirmed*, the facts being stated in the opinion by WILLSON, C. J., as follows:

"The suit was by appellant for damages for personal injuries to his wife, alleged to have been suffered by her as the result of appellee's negligence in failing to have some one to assist her as a passenger in alighting from one of its trains, and in causing the train, while she was attempting to alight therefrom, after it had stopped at the station, to suddenly move and jerk, throwing her from the steps of the car against the same and to the ground. The appeal is from a judgment in appellee's favor, in accordance with the verdict of a jury.

"Appellant's wife was a passenger on one of appellee's trains when it reached Amarillo from Texico. With her was her son, seven years of age, and her daughter, nine years of age. Mrs. Southworth testified: That, after the train had reached the station at Amarillo and stopped, she and her children attempted to alight from same; that appellee had no one at the steps to assist them to alight; and that, as she followed her children down the steps of the car, carrying in her hands a grip weighing forty or fifty pounds, the car suddenly was jerked or moved, causing her to become overbalanced and to fall from the steps, whereby she was injured. The daughter testified: That she and her mother and brother were standing on the platform of the car as the train approached the station; that when the train 'came to a full stop' the witness and her brother alighted therefrom; and that 'the train jerked while her (my)

mother was going down the steps.' McDonald, a witness for appellant, testified that Mrs. Southworth was on the first step below the floor of the train, and that she fell as the train stopped. Mrs. Gillvray, Miss McGillvray and Mrs. Wynn, also passengers on the train, and witnesses for appellant, each testified that she alighted from the train at Amarillo immediately after it stopped at the station, and did not notice that the train moved after it stopped there, and thought it stood perfectly still. The testimony of Bryant and Monfort, witnesses for appellee, also was to the effect that the train was standing still when appellant's wife fell from the steps of the platform of the car. The witness Monfort, who was the conductor in charge of the train, further testified that when Mrs. Southworth fell he was going towards the steps of the car to assist passengers in getting off the same, and in another instant would have reached the steps, 'in ample time,' he added, 'to assist people in getting off who had not left their seats before the train came to a stop.'" * * *

Rehearing denied, May 6, 1909.

Alighting from train — Incumbrances — Attempting to get on train again — Defective track — Carrier liable — Damages.

In MISSOURI, KANSAS & TEXAS RY. CO. OF TEXAS *v.* REDUS, (*Texas Civil Appeals*, March, 1909) 118 S. W. 208, judgment for \$10,000 for plaintiff in the District Court, Hunt county, was *affirmed*, the facts being stated in the opinion by TALBOT, J., as follows:

"This is an action brought by the appellee against appellant to recover damages for personal injuries alleged to have been sustained by him at Royse, Tex., while traveling as a passenger on one of appellant's trains from Dallas to Greenville, Tex. The defendant answered by a general demurrer, a general denial, and specially that appellee's injuries were caused and proximately contributed to by appellee's own negligence, in that he negligently alighted from the train at Royse without appellant's knowledge on the side opposite thereof from the depot and platform provided for the use of passengers; that at the time he so alighted from the train he was intoxicated, or partially so, from the voluntary use of intoxicating liquors; that being in such condition caused, or contributed to cause, him to alight from the train at Royse and on the side thereof opposite from the depot platform, and caused, or contributed to cause, him to fall underneath the wheels of the car and receive the injuries of which he complains. The case was tried before the court and jury March 13, 1908, resulting in a verdict and judgment in favor of plaintiff for the sum of \$10,000, and the defendant appealed.

"The evidence warrants the following conclusions of fact: Appellee was a carpenter and had been at work in Dallas. His home was in Greenville, and about nine o'clock on the night of June 24, 1905, he purchased a ticket from appellant's agent at Dallas, and took passage on one of its passenger trains for Greenville. Shortly after leaving Dallas, the conductor or auditor on the train took up appellee's ticket and placed in his hat a white slip of paper or pasteboard used to indicate the station to which appellee was destined. The color of the slip of paper or pasteboard selected by the conductor or auditor on the night in ques-

tion to indicate Greenville as the place of destination of the passenger was green, and by mistake he placed in appellee's hat a white slip, the white slip indicating Royse, a station between Dallas and Greenville, as his destination. After appellee's ticket was taken up he fell asleep, and, when the train reached Royse, one of defendant's employees on the train awakened him, and told him, in effect, that he had reached his destination, and to get off the train. Believing that he had reached Greenville, appellee hurriedly left the car, and, seeing the gates or way open on both sides of the car platform, got off the train on the opposite side from the depot house and platform. Previous to this appellee had made frequent trips from Dallas to Greenville, traveling on defendant's railroad, and was in the habit of getting off the train at Greenville on the side thereof opposite the depot and platform, which was a safe place to alight, and it was the custom for other passengers to do likewise. The depot and platform at Royse are on the same side of the railroad track that the depot and platform are at Greenville. Almost immediately after alighting from the train at Royse, and just as the train was leaving that station, moving slowly, appellee discovered that the place was not Greenville, and then attempted to get back on the train with a grip in his hand, when he stepped upon or caught his foot in a roughly cut or jagged piece of iron lying on the ground near the railroad track, which caused him to stumble and fall, so that his right foot and leg went on the railroad track, and were run over and crushed in such manner as to necessitate the amputation of the leg between the knee joint and hip. Appellant was negligent in permitting the piece of iron upon which the plaintiff stumbled or in which he caught his foot to remain and be upon the ground near its track, in placing in plaintiff's hat a wrong and misleading conductor's check that indicated that plaintiff's destination was Royse, instead of Greenville, and in telling him he had reached his destination and to get off when the train arrived at Royse. The negligence of defendant's servants as indicated was the proximate cause of plaintiff's injuries, and he was not guilty of contributory negligence." * * *

The court reviewed the assignments of error to the charge of the trial court and its refusal to give certain instructions, and held that there was no error justifying a reversal of the judgment.

On the question of damages, the court said: "Nor do we think the verdict excessive. The plaintiff was a carpenter by trade, and, although fifty-five years of age at the time injured, he was healthy and strong, and earning from \$2.50 to \$3.50 per day. His right leg was crushed and amputated, and, as a result thereof, his capacity as a carpenter was practically destroyed. He was confined to his bed four or five months, and has suffered great mental and physical pain. His life expectancy was eighteen and a half years, and there is nothing in the record to indicate that the jury was influenced by any improper motive."

On rehearing, April 10, 1909, the court said:

"In appellant's motion for a rehearing, we are asked, in effect, to correct our conclusions of fact 'that shortly after leaving Dallas the conductor or auditor of the train took up the appellee's ticket and placed in his hat a white slip of paper or pasteboard used to indicate the station to which the appellee was destined,' and that, 'after appellee's ticket was

taken up, he fell asleep, and, when the train reached Royse, one of defendant's employees on the train awakened him, and told him in effect that he had reached his destination and to get off the train,' and to find definitely that it was the auditor on the train who did those things. In deference to the request, we do not hesitate to say that the testimony warrants such finding; but whether the check was placed in appellee's hat and he was aroused and the statement referred to made to him by the conductor, auditor, or some other employee of appellant assisting the operation of the train is, in our opinion, immaterial in so far as a determination of the legal questions involved are concerned.

"With respect to the grounds of the motion for a rehearing, it is sufficient to state that we see no good reason to change our views as to the law applicable to the facts of the case; and said motion is overruled."

See also, former appeal, 107 S. W. 63.

Alighting from train — Invitation — Alighting place — Carrier liable.

In *INTERNATIONAL & GREAT NORTHERN R. R. CO. v. FORD*, (*Texas Civil Appeals*, April, 1909) 118 S. W. 1137, judgment for plaintiff in the District Court, Johnson county, was *affirmed*, the case being stated in the opinion by TALBOT, J., as follows:

"Ford, the appellee, sued the appellant, railway company, to recover damages on account of personal injuries sustained by him in alighting from one of appellant's passenger trains at Bradley station. The petition alleged, in substance: That plaintiff was a passenger on defendant's said train going from Everman station to said Bradley station; that when the train reached his destination it was night and very dark; that the train was stopped, the station announced, and plaintiff invited or directed by the conductor in charge thereof to alight; that the place where the train was stopped and plaintiff requested to alight was unsafe and dangerous for him to do so, in that the railroad track was upon an embankment and the distance to the ground from the steps of the car about four feet; that defendant's servants negligently failed to furnish a light at or near said place, and so failed to assist him to alight, and failed to provide a box or stool for plaintiff to step upon; that plaintiff did not know of the distance from the steps of the car to the ground; and that, though exercising due care and caution in stepping from the car, because of the great distance to the ground he was thrown or fell with great violence to the ground and seriously injured in his left shoulder, hand, and fingers — the shoulder dislocated and fractured, and the bones of his hand and fingers crushed and broken. The defendant answered by general and special exceptions, a general denial, and plea of contributory negligence. A jury trial resulted in a verdict and judgment in favor of plaintiff, and the defendant appealed.

"The evidence was sufficient to establish the material allegations of plaintiff's petition and to justify the jury's findings that the negligence alleged on the part of the defendant was the proximate cause of his injuries, and that plaintiff was not guilty of contributory negligence and sustained damages in the amount awarded by the verdict." * * *

Rehearing denied, May 15, 1909.

Passenger injured while alighting from train — Sudden start or jerk of car — Carrier liable.

In *ANDERSON v. SALT LAKE & OGDEN RY. Co.*, (*Utah*, April, 1909) 101 Pac. 579, judgment for plaintiff in the District Court, Third District, was *affirmed*, the case being stated in the opinion by FRICK, J., as follows:

"Respondent brought this action to recover for personal injuries which she claimed to have sustained as a passenger while alighting from a passenger car owned and operated by appellant. The injuries, it is alleged, were sustained through the negligence of appellant in negligently moving the train while respondent was in the act of alighting therefrom. A trial to a jury resulted in a verdict and judgment for respondent, and appellant presents the record for review on appeal.

"There are but two questions presented for review. At the trial the court sustained objections interposed by counsel for respondent to certain questions propounded on cross-examination to her husband, who was a witness in her behalf. The witness, in substance, testified that he and his wife (the respondent) and their infant child, on the 8th day of April, 1907, were passengers on a passenger train of appellant; that they had been attending conference at Salt Lake City, and were returning home on the train to Farmington; that the train stopped at the usual place for passengers to alight therefrom; that when the witness and respondent entered the car at Salt Lake City the seats were all occupied, except at one end of the car back of the car door; that the witness and respondent and their infant child occupied this seat, and, when the train stopped at Farmington, in opening the car door it barred the exit from the seat and thus prevented the witness and respondent from leaving the seat or the car until all the other passengers had passed out through the door, after which the door was released, and the witness, with the child in his arms, followed by respondent, could then pass out of the car; that the witness and respondent passed out of the car as soon as they could do so, and the witness alighted from the train, and as respondent was in the act of doing so—that is, when she was about to step from the car step to the ground—the train was suddenly moved forward. The statement of the witness with respect to how the accident happened is as follows: 'The train started with a sudden jerk as she was in the act of getting off, and it threw her off the second step. She lit on the ground on her right foot. I am not positive of that but she said she lit on the right foot; but she lit and her knees went from under her, and as she went backwards I grabbed her with my left hand. I had the baby in one arm, and as I grabbed her I checked her; if I hadn't done that she would have fallen right under the train.' The foregoing substantially covers all that the witness testified to on direct examination. Counsel for appellant proceeded to cross-examine the witness, and, after eliciting from him that the respondent at the time of the accident was in good health and that she needed some assistance to get off the train, the following questions were propounded to the witness, namely: 'Q. Did she say anything on the way [after leaving the train] to you about being hurt?' 'Q. When did she first say anything about being hurt in stepping off the train at this time?' 'Q. Did she ever, at any time, say anything about being hurt at this time by stepping off the train?' Counsel for re-

spondent interposed an objection to each of the foregoing questions upon the ground that the facts sought to be elicited thereby were not proper cross-examination. The court sustained the objections, and the appellant insists that these rulings constitute prejudicial error.

"While no hard and fast rule can be laid down with respect to what may or may not be proper as part of a cross-examination, yet a general rule has been formulated by the courts which is ordinarily sufficient as a guide in most cases. This general rule is to the effect that the cross-examination should relate to the matters stated by the witness on direct examination, and to the facts and circumstances connected with or related to the matters stated by him. In other words, all matters that may modify, explain, contradict, rebut, or make clearer the facts testified to in chief by the witness may be gone into on cross-examination. Ordinarily, when this field has been covered by the cross-examiner, the right, as an abstract right, to further cross-examine ceases. Beyond this the matter of cross-examination necessarily, to a very large extent at least, must be left to the sound discretion of the trial court. There may be good reasons appearing to the trial court in a certain case, and as it affects a certain or particular witness, why the scope of cross-examination with regard to collateral matters should be either restricted or extended. The answers to the questions propounded in this case could in no way contradict, modify, explain, or make more clear, and intelligible anything the witness had testified to on direct examination. Appellant, therefore could proceed further with the cross-examination only, when, in the judgment of the trial court, it was proper under all the circumstances to do so. The court evidently thought this was not necessary, and in our judgment nothing is made to appear that it abused its discretion in this respect. With respect to such matters reviewing courts ought to be very careful, and should hesitate long before reversing judgments upon the ground that the trial court either restricted or enlarged the scope of cross-examination." * * *

Passenger killed alighting from moving train at flag station — Contributory negligence.

In *HOYLMAN, Adm'r, v. KANAWHA & MICHIGAN R. R. Co.*, (*West Virginia*, March, 1909) 64 S. E. 536, judgment for plaintiff for \$5,000 in the Circuit Court, Kanawha county in action for death of plaintiff's intestate, John L. Porter who, while a passenger on defendant's train, was killed in getting off the train at a flag station, was *reversed*. Opinion by BRANNON, J., the facts being stated as follows:

"There is no conflict of evidence in the case. Tested by the evidence adduced by the plaintiff, the facts are: That Porter sat in the third seat some ten feet from the door of the car, and he was engaged in active conversation with a passenger, Garten, in the next seat behind him. A friend named Kirby, when the train stopped, went to Porter's seat and carried a bundle out for him and got off the train. Porter did not go with him. Three or four other passengers got off the train. Porter lingered in his seat, though the train had stopped, talking to Garten in the next seat behind. He lingered so that that passenger, Garten, who remained on the train, warned Porter that he had better get off the

train while it stopped. Porter started for the door, and before he got to the door — indeed, before he left his seat — the train started; but Porter went on down the steps when the train was moving and stepped on the platform holding to the railing of the car with his right hand, and did not let go of it, but held to it while he took two or three steps in the direction the train was moving and increasing in speed, and he lost his balance and fell under the wheels. Before he got out of the door, the train was moving. The conductor swears that a stop of the usual length for that station was made. No evidence contradicts this. Other passengers, three or four, got off. This affords evidence that the length of stop was reasonable. *Hurt v. St. L. I. M. & S. R. Co.*, 94 Mo. 255, 4 Am. Neg. Cas. 584, 7 S. W. 1. There was no crowd. The conductor swears that he stood, as he usually did, at the other end of the car before the one in which Porter rode and looked through both cars to see that all the passengers were off and did not see Porter. There is no contradiction of the conductor in this. A witness of the defense, uncontradicted, says Porter was still talking to Garten at his seat when the train started. This would show that Porter had not yet come out of his seat into the aisle, but was tarrying in his seat talking to Garten. Garten's evidence confirms this. The evidence clearly shows that before Porter got to the door the train had started. The evidence shows that Porter was well acquainted with this station and had reason to know that the usual stop there was of short duration." * * *

The court cited several authorities on the question of contributory negligence of persons alighting from moving trains. *O'Toole v. R. R. Co.*, 158 Pa. St. 106, 27 Atl. 738; *Walters v. Chicago & N. W. Ry. Co.*, 113 Wis. 367, 89 N. W. 140; *Simmons v. Air Line, etc., Co.*, 120 Ga. 225, 47 S. E. 570; *McDonald v. B. & M. R. Co.*, 87 Me. 466, 3 Am. Neg. Cas. 607, 32 Atl. 1010; *Shannon v. B. & A. R. Co.*, 78 Me. 59, 3 Am. Neg. Cas. 585, 2 Atl. 678; *Browne v. R. & G. R. Co.*, 108 N. C. 34, 6 Am. Neg. Cas. 106, 12 S. E. 958; *Morrow v. Atlanta, etc., Co.*, 134 N. C. 92, 46 S. E. 12; *Brown v. Chicago, etc., Ry. Co.*, 80 Wis. 162, 49 N. W. 807; *McDonald v. Montgomery R. Co.*, 110 Ala. 163, 20 So. Rep. 317; *Cumberland V. R. Co. v. Maugans*, 61 Md. 62, 3 Am. Neg. Cas. 648; *Mearns v. R. R. Co.*, 163 N. Y. 108, 57 N. E. 292; *Brown v. R. R. Co.*, 181 Mass. 365, 63 N. E. 941; *Werbowsky v. Ft. W. & E. Ry. Co.*, 86 Mich. 239, 48 N. W. 1097, 4 Am. Neg. Cas. 112; *Newlon v. R. R. Co.*, 127 Iowa, 654, 103 N. W. 999; *Whelan v. Ga., M. & G. R. Co.*, 84 Ga. 506, 2 Am. Neg. Cas. 433, 10 S. E. 1091; *East Tenn., Va. & Ga. R. Co. v. Massengill*, 83 Tenn. 328, 6 Am. Neg. Cas. 455; *Ill. Cent. R. Co. v. Davidson*, 64 Fed. 301, 7 Am. Neg. Cas. 441, 12 C. C. A. 118; *Internat., etc., R. Co. v. Rhoades* (Tex. Civ. App.) 51 S. W. 517; *Raben v. Central Iowa R. Co.*, 73 Iowa, 581, 3 Am. Neg. Cas. 379, 35 N. W. 646; *Straus v. K. C. St. J. & C. B. R. Co.*, 75 Mo. 185, 4 Am. Neg. Cas. 517.

The points decided are stated in the syllabus by the court as follows:

"1. The general rule is that passengers getting off a moving railroad train are chargeable with contributory negligence and cannot recover for injury received therefrom.

"2. The act of getting on or off a moving train is evidence of contributory negligence, and imposes upon one who is injured in doing so

the burden of proving that the peculiar circumstances of the case justified him in such course.

"3. When, in action against a railroad company for personal injury to a passenger, the evidence is such that a verdict for the plaintiff should be set aside, the Circuit Court, if asked, should direct a verdict for the defendant, and, if it refuses, the Appellate Court will reverse judgment and verdict and remand the case for a new trial, unless this court can see clearly that the plaintiff cannot better his case upon another trial."

On rehearing (May 12, 1909) the court reviewed parts of the evidence and held that the evidence was not sufficient to sustain the verdict for plaintiff.

Passenger injured while alighting from a "mixed train" — Sudden start — Announcing station — Assisting passenger — Rules — Evidence — Instructions — Errors.

IN CHICAGO, BURLINGTON & QUINCY R. R. CO. ET AL. v. LAMPMAN, (*Wyoming*, November, 1909) 104 Pac. 533, judgment for plaintiff for \$8,211 and costs, in an action in the District Court, Big Horn county, for injuries sustained while alighting from defendant's train, was *reversed* for several errors in admission of evidence, etc. The facts are stated in the opinion by BEARD, J., as follows:

"The plaintiff, on August 2, 1907, was a passenger for hire on a mixed train on the defendant railroad company's road from Cody to Garland, stations on said road in Big Horn county, and the other defendant, Rhinemuth, was the conductor in charge of the train. The negligence charged in the petition is that, upon the arrival of the train at Garland, and while plaintiff, with all due care and diligence, was in the act of alighting therefrom, and before she had been allowed a reasonable time to alight, the said conductor wrongfully, carelessly, and negligently signaled the engineer to start, and that the train was negligently, suddenly, and violently started while plaintiff was in the act of alighting therefrom, and before she had been allowed a reasonable time to alight, by reason of which she was thrown violently to the station platform and injured. It is further alleged that it was defendant's duty to announce the station at or before the arrival of the train at said station, and to stop the train and keep it standing a sufficient length of time to afford the plaintiff an opportunity to alight therefrom in safety, that they neglected their duty in that regard and did not give the plaintiff an opportunity to alight, and that her injuries were caused by defendant's said negligence. The defendants denied these allegations, denied any negligence on their part, and alleged that the plaintiff's injuries were caused by her own negligence in attempting to alight from train while it was moving.

"It appears from the evidence that the train upon which plaintiff was a passenger was a regular train, classed as a 'mixed train,' and equipped for both freight and passenger service, but on this occasion consisted of an engine, combination car (one half of which was used for transportation of baggage, express, and mail, and the other half containing seats for passengers) and two coaches. The plaintiff testified that she was sixty years of age and reasonably active; that she with her grandson, a boy about fourteen years of age, was riding in the rear coach of the train about four seats from the rear end of the car; that the train arrived

at Garland station about five o'clock P. M., and stopped, the rear end of the car in which she was riding not quite reaching the station platform; that the station was not announced by any of the employees of the company; that she resided at Garland, and knew when the train stopped that it had arrived at her destination, and that she and the boy at once left their seats and walked to the front end of the car to alight; that the boy walked just in front of her, opened the car door, went out upon the platform of the car, ran down the steps, threw a valise which he was carrying onto the station platform and jumped off; that the train was then moving, and that she noticed that the train was moving when she stepped out of the car door, but thought it would stop again, as it had stopped so short a time; that she went down to the lower step of the car holding to the railing with her left hand, and holding her skirts and pocketbook in her right hand; that she did not intend to get off when she went down the steps because it was going too fast, and she did not think it prudent for one of her age to jump off the train, but thought it would slow up or stop at the station door; that when she reached the lower step the train gave a lurch or jerk and threw her off. There was evidence tending to corroborate her testimony as to her movements after the train stopped, and that it stopped a very short time—estimated by some of the witnesses at half a minute—and that she was jerked or thrown from the step, and that at the time she went down the steps the train had moved only a few feet, and had not attained a speed of more than three or four miles an hour. On the part of the defendants the conductor, engineer, station agent, and a brakeman testified that the train stopped about two minutes; the engineer and agent stating that they observed the time by their watches, and that the stop was two minutes. This was the only stop at that station at that time. The conductor testified that before giving the signal to start he looked back along the train, and saw no one getting on or off the train; that the train had gone between thirty and forty feet before he got on between the first and second cars; that he was facing the rear of the train when he got on, and saw no one, and that the train was going probably five or six miles an hour when he got on. As to the manner in which the train was started, the distance it had gone before the happening of the accident, and the speed of the train at that time the evidence is conflicting. There is also a conflict in the evidence as to whether plaintiff stepped or jumped from the steps, or was jerked or thrown therefrom." * * *

In discussing the assignments of error the court said:

"No. 20, assigning as error the admission in evidence of a rule of the defendant company requiring the station to be announced on the arrival of passenger trains at stations, and No. 41, the denial of a motion to strike out all evidence in reference to the failure to announce the station, may be considered in connection with the refusal to give the ninth instruction requested by defendants, which is as follows: 'You are instructed that, as plaintiff herself states that she was acquainted with the station of Garland, knew when the train stopped there that she had arrived at her destination, and at once, when the train so stopped, left her seat to alight, it is immaterial whether the train was or was not called by any one on approaching Garland, and you will therefore entirely disregard the allegation

in plaintiff's petition. as also all evidence showing such call not to have been so made.' The purpose of announcing the station is to inform passengers that the train has arrived, or is about to arrive, at a certain station, in order that they may prepare to and alight promptly. In this case the plaintiff had testified, before the rule was offered in evidence, that she lived at Garland; was well acquainted with the station; knew when the train stopped that she had arrived at her destination; and at once left her seat for the purpose of alighting. It thus appears that she was possessed of all the information that an announcement of the station could have given her, and that the failure to do so did not cause or contribute to her injury. There being no evidence to sustain the allegation of the petition that the injury was caused by the failure to announce the station, the evidence as to such failure and the rule of the company requiring such announcement to be made were immaterial, and the defendants were entitled to have the jury so instructed.

"It is also contended that the court erred in refusing to give the following instruction requested by defendants: 'You are instructed that in case the train in question was stopped a sufficient time for plaintiff to alight, those operating such train were under no obligation to ascertain if plaintiff had actually gotten off or not.' It was the duty of defendants to stop the train at the station for a reasonable time to afford passengers for that station an opportunity to alight in safety; and for negligence in that respect, resulting in injury to such passenger, no doubt the company would be liable. It is equally the duty of passengers, when they know that the train has stopped at the station where they desire to alight, to do so with reasonable promptness. The length of time the train should stop necessarily varies with the circumstances. For instance, it requires more time for many passengers to get off or on a train than it does for a few. In the case at bar the court by other instructions properly submitted that question to the jury. If the jury found from the evidence that the train was stopped for a reasonable time to afford the plaintiff an opportunity to alight in safety—and there was evidence from which it may have so found—then we think that the reasonable rule, supported by the authorities, is that those in charge of the train had the right to assume that plaintiff had availed herself of the opportunity, and had performed her duty to alight with reasonable diligence, and that they were not required to ascertain if she had in fact done so, and that they would not be guilty of negligence in starting the train after having allowed such reasonable time, unless there was something in the circumstances to indicate or cause them, in the exercise of reasonable diligence, to suspect that some one had not gotten off, or was in the act of so doing, or was otherwise in a position of danger if the train should be started." * * * (Citing 3 Thompson's Comm. on Negl., § 2861; *Shealey v. Ry. Co.*, 67 S. C. 61, 45 S. E. 119; *Straus v. K. C., St. J. & C. B. R. Co.*, 75 Mo 185, 4 Am Neg. Cas. 517; *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 7 S. W. 1, 4 Am. Neg. Cas. 584; *Raben v. Central Iowa Ry. Co.*, 73 Iowa, 579, 35 N. W. 645, 3 Am. Neg. Cas. 379; *Central of Georgia Ry. Co. v. McNab*, 150 Ala. 332, 43 So. Rep. 222; 6 Cyc. 613; 5 Enc. Law [2d ed.] 578; note, 7 Am. & Eng. Ann. Cas. 760).

"It is argued by counsel for plaintiff that this instruction was properly

refused because of certain rules of the company, admitted in evidence over defendant's objection, to the effect that before giving the 'all right' signal to the conductor, the brakeman should look through the cars to see that there were no further movements of passengers, and that the train should not be started until all movement of passengers to and from the cars had ceased and the 'all right' signal had been given by every trainman. The requirements of these rules, in so far as they require those in charge of the train to look through the cars before starting the train and to see that there were no further movements of passengers, require a higher degree of care than the law requires, if in fact the train was stopped for a reasonable and sufficient time for passengers in the exercise of reasonable diligence to alight in safety; and the failure to do so in such case would not constitute negligence for which the company would be liable, unless as we have already stated, there was something in the circumstances known to, or which would cause, those in charge of the train by the exercise of reasonable diligence to suspect that some one would be endangered by starting the train. On the other hand, if the evidence established the fact to be that the stop was not for a reasonable time, the defendants would be liable for an injury sustained by a passenger who, in the exercise of reasonable care and diligence, was attempting to alight when the train was started. But the liability in such case does not arise from the failure of those in charge of the train to observe the rules of the carrier adopted for their guidance, but because of the failure to exercise that degree of care which the law requires of the carrier. The observance of the rules of the carrier may or may not constitute due care; and likewise a failure to observe them may or may not constitute negligence. To otherwise state the proposition, the question is, was there a failure to exercise that degree of care which the law requires of the carrier for the safety of the passengers, and not whether or not some rule of the carrier has been violated. We think the requested instruction contained a correct statement of the law; that it was applicable to the evidence, and should have been given."

Referring to the assignment of error as to admission of certain rules requiring conductors and brakemen to assist passengers in entering or leaving cars, the court said:

"So far as we have been able to discover, the rule of law announced in the decisions is that 'ordinarily there is no duty resting upon a carrier of passengers to assist a passenger in boarding or alighting from its trains or cars.' 13 Am. & Eng. Ann. Cas. 506 (note); 6 Cyc. 611; 5 Enc. Law (2d ed.) 579, and cases cited in these references. There being no duty resting upon the defendants to assist the plaintiff to alight, the failure to do so would not be negligence rendering the defendants liable. In this case there is no allegation in the petition that the plaintiff was a person requiring assistance by reason of physical infirmity or otherwise, nor is there any evidence to that effect, nor does it appear that she knew of the existence of the rules and relied upon their observance. In so far as the rules required the brakemen to render personal assistance to such passengers in alighting from the cars, they required more than the law requires of the carrier for the safety of passengers. It has been generally held, we think, that where the

private rules of the carrier, adopted for the government of the conduct of its servants in the operation of its trains, do not require more than the law requires of the carrier with respect to the matters covered by such rules, their admission in evidence is not prejudicial. But we think that where they require more than the law requires, or where they require the performance of acts which the law does not recognize as a duty devolving upon the carrier, they are inadmissible. The question has not heretofore been passed upon by this court, and therefore we shall refer to the cases cited by counsel and to others which we have examined."

* * * (Citing *Atlanta R. Co. v. Bates*, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128; *Balt. R. Co. v. State*, 81 Md. 371, 9 Am. Neg. Cas. 425, 32 Atl. 201; *Chicago & A. R. Co. v. Kelly*, 75 Ill. App. 490; *Stevens v. Boston E. R. Co.*, 184 Mass. 476, 15 Am. Neg. Rep. 338, 69 N. E. 338; *Frizzell v. Omaha St. R. Co.*, 124 Fed. 176, 59 C. C. A. 382; *Del. L. etc. R. Co. v. Ashley*, 67 Fed. 209, 14 C. C. A. 368, 10 Am. Neg. Cas. 651; *Carlton v. C. S. & M. R. Co.*, 120 Mich. 481, 79 N. W. 688; *Street Ry. Co. v. Altemeier*, Adm'r, 60 Ohio St. 10, 53 N. E. 300; *L. S. & M. S. Ry. Co. v. Ward*, 135 Ill. 511, 26 N. E. 520; *Hauer's Case [B. & O. R. Co. v. State]*, 60 Md. 449, 3 Am. Neg. Cas. 632; *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166; *McKernan v. Detroit Citizens' St. Ry. Co.*, 138 Mich. 519, 101 N. W. 812; *Dixson v. Grand Trunk W. Ry. Co.*, 155 Mich. 169, 118 N. W. 946).

After quoting from several of the cited authorities the court said: "We think the test is whether or not a failure to observe the requirements of the rule not shown to have been known to and relied upon by plaintiff, would constitute actionable negligence. If the court can say as a matter of law that such failure is not a violation of any duty imposed by law upon the carrier, the rule should be excluded. One carrier may adopt one rule, and another carrier may adopt another; and, if such rules are to be treated as admissions that due care requires their observance, then we would have as many different measures of liability as there are different rules, while the law has but one requirement for all, and that is the exercise of that degree of care which it imposes on all carriers of passengers, and whether such care has or has not been exercised should be determined from what was done, or omitted to be done, in the particular case. What would be the exercise of due care under one state of facts might be negligence under a different state of facts. Applying the law, as we understand it to be, to the facts of this case, the admission of the rules with reference to looking through the train before starting it would not have been prejudicial had it been limited as requested in the instruction; but the rules requiring the brakemen to assist passengers to alight should have been excluded. The jury, under the instructions as given, may well have concluded that any violation of these rules by the servants of the company rendered it liable."

[**Note.** *The following proceedings before the SPECIAL MASTER in the United States Circuit Court, Southern District of New York, relative to the claims of CORCORAN, HIBBARD and ADAMS against the NEW YORK CITY RAILWAY COMPANY, arising out of injuries sustained while alighting from street car and also from injury sus-*

tained on the car, giving the reports of the SPECIAL MASTER, GEORGE C. LAY, ESQ., on the claims, are furnished by JOHN M. GARDNER, ESQ., of the New York Bar, Editor of Vols. 1-20 AM. NEG. REP., who has also commented upon the rulings in a note to each of the aforesaid claims.]

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF THE CLAIM OF
ELISHA C. HIBBARD
against
NEW YORK CITY RAILWAY COMPANY.

OPINION
by
SPECIAL MASTER
(September 21, 1908)

The above claim was referred by an order of the United States Circuit Court for the Southern District of New York, entered June 30, 1908, to GEORGE C. LAY, ESQ., SPECIAL MASTER, to hear and determine the issues in the action brought upon the claim, and was tried before the Special Master who rendered the opinion (1).

SAMUEL R. TAYLOR appeared for claimant.

CHARLES E. CHALMERS, for the Railway Company.

No exceptions were filed to the REPORT OF THE MASTER.

OPINION BY SPECIAL MASTER.

The plaintiff has established facts, which standing uncontradicted, entitle him to recover damages for the negligence of the defendant. It appears from the evidence of the plaintiff, on direct examination,

1. The above case illustrates the firmness of the doctrine in the State of New York, that where a passenger by word or sign indicates to the one in charge of the car his desire to alight, in response to which the one in charge proceeds to reduce the speed for the purpose of permitting the passenger to alight, the passenger has a right to rely upon such act, which *implies an assurance* of the conductor's *intent* to bring the car to a standstill. If the passenger is injured while proceeding to get off the car, even though it may be in

slow motion but starts up suddenly, the carrier is liable. Two propositions of law are established by the decision: 1. That he (the passenger) is not guilty of contributory negligence as matter of law; and, 2, the defendant may be guilty of negligence as a matter of fact.

Of course, as illustrated in the Armstrong case (36 App. Div. 526) it is essential that notice of an intention to alight must first be brought to the operator's or conductor's attention, otherwise there is no ground for predicating a charge of negligence.

that while a passenger on an open car of the Eighth Avenue line, going south, and approaching Ninety-sixth street (Borough of Manhattan, City of New York) he signaled the conductor to stop, the signal was responded to and the car slowed up, coming almost if not fully to a stop, and as the plaintiff put one foot on the ground, with his other foot on the running board and his hand on the rail, the conductor rang for the car to go ahead; the car suddenly started and the plaintiff was thrown off into the street, sustaining painful injuries. On cross-examination, the plaintiff testified that he did not remember whether he heard the bell ring. On re-direct examination he could not say whether he heard the bell to start.

The authorities amply support the position that where it appears that a passenger who gives notice to the conductor, by word or sign, that he desires to alight from a car, and the conductor responds to the signal and the car slows up, the passenger is justified in preparing to alight and if in the act of alighting and before he has a reasonable time to get off, the car is suddenly started, and injuries are sustained, the question of negligence is for the jury and that it is error to dismiss the complaint. *Harris v. Union Ry. Co.*, 69 App. Div. (N. Y.) 385; *Crow v. Met. St. Ry. Co.*, 70 App. Div. 202, aff'd 194 N. Y. 359; *Klein v. N. Y. City Ry. Co.*, 53 Misc. (N. Y.) 571.

In the *Harris* case, above cited, it was farther held that it was not contributory negligence *per se* for a passenger to alight from a slowly moving car.

In numerous cases also the rule has been established that it is not contributory negligence, as a matter of law, to board a slowly moving car. *Morrison v. Broadway & Seventh Ave. Ry. Co.*, 130 N. Y. 166, 5 Am. Neg. Cas. 353; *Kimber v. Met. St. Ry. Co.*, 69 App. Div. 353, 11 Am. Neg. Rep. 309.

In both the *Kimber* and *Crow* cases, *supra*, the case of *Armstrong v. Met. St. Ry. Co.*, 36 App. Div. 525, was distinguished, and it is proper to distinguish the *Armstrong* case here. The point in the *Armstrong* authority was that the plaintiff failed to prove that the motorman had been given any signal, and it was held that negligence could not be imputed, if the car was suddenly accelerated, without proof that the motorman had notice of the plaintiff's intention and desire to quit the car. To make out a cause of action it is not essential for the plaintiff to swear that he actually heard the bell ringing either to stop or start the car. It is sufficient, if in obedience to the signal, there was response thereto and the car slows up; it is a fair inference from these circumstances that when the conductor gives

the signal to the motorman and the car slows up, the lessening of speed is due to the signal of the conductor, although the bell is not actually heard.

In *Harris v. Union Ry. Co.*, 69 App. Div. (N. Y.) 385, the plaintiff could not swear that she heard any bell but she saw the conductor raise his hand to the bell rope and the car slowed up. The court held that the evidence required a submission of the question of negligence to the jury.

The issues are thus presented to me, sitting as a jury, and I find as matters of fact that the plaintiff has shown himself to be free from contributory negligence and has established the negligence of the defendant. The only question that remains is the amount of damages to be awarded.

It does not appear that the plaintiff has suffered any loss in respect to his earning capacity. His injuries, although painful, were not so serious as to incapacitate him from his usual work.

In *Pickett v. Town of Watertown*, 47 App. Div. (N. Y.) 629, a verdict of \$1,200, for contusions of the face and the breaking of two ribs, was held excessive. The injuries in the case cited were much more severe than in the present case. The award of damages must be made with regard to the opinions of the courts in various classes of accidents.

I think the injuries sustained justify an award of \$650 (six hundred and fifty dollars)

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

JOHN Q. ADAMS
v.
NEW YORK CITY RAILWAY COMPANY.

MEMORANDUM
by SPECIAL MASTER
(June 8, 1908)

This is the fourth trial of this case. The plaintiff sustained painful and permanent injuries for which he seeks to recover damages against the defendant (1).

1. In the above case, the learned Master adopted a rule of law at war with the purpose of a new trial by an Appellate Court, on the ground that a verdict is against the weight of evidence. Not only does an exami-

nation of the record before the Master disclose that defendant offered no proof at all, but that new witnesses, disinterested and credible, not previously sworn on the hearing before, testified strongly in plaintiff's favor on

Upon the first trial, the evidence of all the witnesses substantially agreed that the accident occurred at or near the railroad crossing on Forty-second street at the intersection with Lexington avenue (New York city, Borough of Manhattan). Upon the first appeal the judgment in plaintiff's favor was reversed upon the ground that the evidence failed to show that the car gave a sudden and violent jerk or lurch forward sufficient to throw the plaintiff to the ground, while the plaintiff was exercising due care. (116 App. Div. 315.) In effect, it was held that there was no proof of negligence on the part of the defendant, and the plaintiff did not show himself to be free from contributory negligence.

This decision was undoubtedly based upon the undisputed evidence on the first trial that the plaintiff fell off or was thrown off at a point near the railroad crossing, where the car could not stop or where it was dangerous for the plaintiff to attempt to alight.

Upon the trial before the Special Master, the witnesses Petts, Brennan and Keating, and the plaintiff himself, all testified that their evidence given on the first trial was not correct in fixing the spot where the plaintiff was thrown or fell to the ground. These witnesses on the second trial and on the trial before the Special Master, testified that the exact location where the plaintiff struck the ground was about seventy-nine or eighty feet south of the corner. The obvious effect of this change in the evidence is to enable the plaintiff to claim negligence and freedom from contributory negligence upon a different theory, viz.: that the accident was caused by the act of the conductor in suddenly starting the car at a point where it could have been stopped, and that the plaintiff was justified in assuming that the car would stop as he stepped upon the lower step and put himself in a position to alight from the car. There is no doubt that the testimony of the witnesses given on the second trial and on the

the very point of fact in dispute. Thus, the decision is authority for the proposition that, where a plaintiff obtains a verdict on positive and conflicting evidence, which is set aside by an Appellate Court as not fairly sustained by the evidence, and outweighed by that of his adversary, the trial tribunal may, on a second trial, disregard all new testimony, no matter by whom given, or whether disputed or not, and direct a dismissal of the action.

The report as disclosed by the record was confirmed by JUSTICE LACOMBE on exceptions filed to the Master's report, and thus the Circuit Court of the United States for the Southern District of New York stands sponsor for this doctrine.

The learned Special Master, nor his Honor Justice Lacombe, cited no precedent for the principle of the decision, and it has taxed our researches in vain to find one.

trial before the Special Master would, if entitled to credit, make an entirely new case, upon which it might be urged with force that there was sufficient evidence to go to the jury upon the question of the defendant's negligence, and to justify the inference that the plaintiff was free from contributory negligence.

The Appellate Division reversed a judgment in favor of the plaintiff upon the second trial upon the ground that the change of testimony was such as not only to excite suspicion, but to induce the court to throw out and disregard the testimony as unworthy of belief. The court criticised the witnesses with severity and referred to the want of candor of the plaintiff in showing ignorance of the terms of the court's opinion on the first appeal. (N. Y. Supp. App. Div. advance sheets, May 18, 1908, p. 1019).

It was and is unfortunate for the plaintiff that his witnesses so uniformly agree on the second trial and on the trial before the Special Master that the accident occurred at a different place than was first indicated. The presumption is that their recollection of events was better at the time of the first trial than at a later period, and their testimony then is more to be credited than that given now.

The plaintiff is bound to satisfy the court by a preponderance of evidence upon the vital questions of fact in the case. It is unreasonable to conclude that the present version of the witnesses as to the place of the accident is more worthy of belief than the version they have given at the first trial, when the occurrences were fresher in their memory.

The case, therefore, rests substantially upon the same facts as were presented on the first trial, and I am constrained to follow the law of the case as laid down by the Appellate Division on the first appeal, and disallow the claim, however unfortunate it may be for the plaintiff and however great the sympathies of the MASTER are aroused by the severe injuries sustained by him.

There should be a report in this case disallowing the claim.

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF THE CLAIM OF
ELLEN CORCORAN
against
NEW YORK CITY RAILWAY COMPANY.

OPINION
by
SPECIAL MASTER
(May 15, 1908)

The above claim was referred by an order of the United States Circuit Court for the Southern District of New York entered March

4, 1908, to GEORGE C. LAY, ESQ., SPECIAL MASTER, to hear and determine the issues in the action brought upon the claim and was tried before the SPECIAL MASTER, who rendered the opinion (1).

No exceptions were filed to the REPORT OF THE MASTER.

W T. GRIDLEY appeared for claimant.

ABEL I. SMITH, for Railway Company.

OPINION BY SPECIAL MASTER.

In this case it appears that the plaintiff, a woman over fifty years of age, was seated in the defendant's car, when a quarrel arose between the conductor and an ambulance driver, after a collision between the car and the ambulance. The conductor was on the back platform of the car scolding the driver and they called each other foul names; the car started on, the driver pursued and jumped on the car, and the conductor retreated into the car. In the effort to escape, the conductor stepped on the plaintiff and in the scuffle the plaintiff was thrown down and the conductor fell on her causing injuries.

The plaintiff claims that the duty of the company to safely carry her and protect her from injury was violated and that the negligence of the company is shown by the misconduct of the conductor in using foul language to a third person, which tended to induce or precipitate a fight, resulting in her injury.

The rule is well settled that a common carrier *must exercise the utmost vigilance* to guard passengers against careless interference or violence by others, and is responsible for any violence or misconduct of his servants. *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494, 497 (9 Am. Neg. Cas. 593); *Koch v. Brooklyn Heights R. R. Co.*, 75 App. Div. (N. Y.) 283.

1. The above case announces an important principle of law, holding common carriers responsible for the misconduct of their employees. The principle is quite universally recognized that if the misconduct of the servant while acting in the scope of his authority, directly causes the injury, the defendant is liable; but, where the misconduct sets in motion other agencies which are the direct cause of the injury, the question has not been so clearly decided. The above decision, however, announces

flatly the principle that if the act of the servant contributed to precipitate a fight, movement or other action, resulting in injury to the passenger, the carrier is liable.

On principle, we think the learned Master is correct, upon the ground that his conduct was the proximate cause of the injury, and, had it not been for the misconduct, it is evident that the injury would not have resulted, even though proceeding from an intervening agency.

"Any person rightfully on the cars of a railroad company," the Court of Appeals said in *Gillespie v. Brooklyn Heights R. R. Co.*, 178 N. Y. 347, 352 (16 Am. Neg. Rep. 181), "is entitled to protection by the carrier and *any breach of its duty in that respect is in the nature of a tort.*"

In *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336 (9 Am. Neg. Cas. 648), the court declared that a guard who had a quarrel with a drunken passenger and struck at him upon a crowded platform was guilty of negligence, using this language, at p. 341: "The action of the defendant's servant in so conducting himself as to cause the crowd upon the platform to sway and jostle the plaintiff to an extent that induced him to seize the rail, was also evidence tending to show negligence in the defendant." The court, at p. 342, refers to the action of the guard in quarreling with and striking at a passenger as causing the injury.

So, it has been held that street railway companies, as common carriers of passengers, are liable for the *slightest negligence*. *Lincoln Tr. Co. v. Webb* (Neb.), 102 N. W. 258 (17 Am. Neg. Rep. 617).

The rule has been stated also in these words: "It is an implied condition of the agreement of railroad companies with each passenger that the latter shall not be put in jeopardy by even the *slightest fault* of the servants of the company. *Clerk v. Morgan*, 107 La. 370.

These principles have been applied in a variety of cases. In *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554 (8 Am. Neg. Cas. 103, 104), Judge Shipman charged the jury in this case, where a passenger was injured by the discharge of a musket by a soldier on a boat, the result of which injury was the amputation of the plaintiff's foot, using this language: "They undertook to transport him for hire and were bound to secure him a safe passage so far as that could be done by the exercise of due care on their part. This was a duty imposed upon them by their contract and by law. The precise rule of duty to which they are to be held and which you are to apply to the evidence in deciding whether or not they are liable in this action is this: The defendants are bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers from danger from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances and of the number and character of the persons on board. * * * If armed and boisterous quarrelsome soldiers rushed into this space after the passengers had come on board and produced and continued an uproar there, it was the duty of the de-

fendants, through the officers and hands of their boat to make every effort to quell the disturbance and protect their passengers from violence and danger and to call upon the military officers to enforce discipline."

In *Exton v. Central R. R. Co.*, 62 N. J. L. 7 (5 Am. Neg. Rep. 675), the plaintiff, while going through a passageway or plank walk under the control of the company, was knocked down and injured by cabmen who had got into a scuffle. The court used this language, at p. 15: "Carriers of passengers are bound to exercise the utmost care in maintaining order and guarding those they transport against violence *from whatever source arising*, which might be reasonably anticipated or naturally expected to occur. The carrier must exercise the care required to protect the passenger from violence even by a stranger. The carrier is bound to protect from the insults and wanton interference of strangers and fellow passengers."

In *Partridge v. Woodland Steamboat Co.*, 49 Atl. 726, 66 N. J. L. 290, 10 Am. Neg. Rep. 627, the court quoted the court in last above case (*Exton v. Central R. R.* 62 N. J. L. 7, 5 Am. Neg. Rep. 675) as follows: "The general rule is clear that *from whatever source the danger may arise* if it be known or should have been known, care must be exercised to protect the passenger from that danger."

In *Spinney v. Boston Elev. Ry. Co.*, 188 Mass. 30, the court held that a conductor who carelessly fell upon the plaintiff by reason of a sudden jolt of a car and threw the plaintiff down, there was evidence of want of care sufficient to go to the jury. In that case the court, referring to the acts of a conductor says: "So to speak, his conduct in the car was official conduct as it regarded a passenger, and could not be looked at in a light merely personal to himself. If it was in any respect wanting in due care and that negligence caused injury to the plaintiff's person, it was negligence for which the defendant was answerable, whether the conductor was competent or incompetent and whether or not the company might reasonably have known his competency."

The duty of a conductor to be civil, respectful, humane, and to refrain from quarrels is also referred to in several authorities:

In *Gallena v. Hot Springs R. R. Co.*, 13 Fed. 116 (8 Am. Neg. Cas. 705n), the conductor ejected a passenger for not having a proper ticket and the passenger afterwards got on the car. When the conductor saw the passenger again he flourished a revolver and threw the man off the car into a ditch while the train was going slowly. The court said in the opinion: "The law requires railroad

companies to carry their passengers safely and treat them respectfully. They are under obligations to use proper precautions and exertions to protect passengers while in the cars from the violence and insults of strangers and co-passengers and they are bound to protect them from the assaults, insults and violence of their own conductors and servants. They select and appoint their own conductors without consulting the passengers and it is but reasonable that they should be held responsible for any act of violence to the passengers of which the conductors may be guilty. The moment the passenger enters the car he is more or less under the control of the conductor and subject to his orders. Fit or unfit, humane or brutal, good tempered or morose, the passenger is comparatively helpless and may be obliged to submit for the time without any means of redress. *Pendleton v. Kinaby*, 3 Cliff. 416. The law, therefore, makes it the duty of railroad companies to employ competent, sober and civil men to discharge the responsible duties devolving on a conductor; and for the assaults, injuries and wrongs inflicted on a passenger by a conductor in the course of his employment as such the railroad company is responsible. * * * The office of a conductor of a passenger train is an exceedingly important and responsible one. There are no positions which demand of their incumbents more good judgment and self-possession. Not only the peace and comfort, but the lives as well, of passengers are in their keeping. They must not, by any act of their own, disturb the one or endanger the other. * * * *It is obvious that if a conductor was to attempt to redress every personal insult and enter into a boisterous quarrel with every vulgar or rude person who might invite it, there would be no peace or safety for his passengers. He must decline all such contests. He can take action only in those cases where the rights of the railroad company or the peace or safety of the passengers under his charge or his own safety demand it.*"

Elliott on Railroads (Vol. 4, § 1638) referring to the responsibility of carriers in cases of misconduct by its employees, says: "It is not merely a question of negligence in such cases, nor is it strictly a question depending upon the scope of the defendant's particular employment. It is a question of the absolute duty of a railroad company to its passengers as long as that relation subsists and a breach of that duty whether caused by the wilful act of an employee or not. * * * Either the company or the passengers must take the risk of infirmities of temper, maliciousness and misconduct of the employees whom the company has placed upon the train and to whom it has committed the discharge of its duty to pro-

tect and look after the safety of its passengers. A passenger has no control over them and the company alone has the power to select and remove them. It is, therefore, but just to make the company rather than the passengers take this risk and to hold it responsible."

In the light of these authorities this case must be considered. The question to be determined is whether the conductor was guilty of any fault or misconduct, or want of care which amounts to negligence and for which the company is responsible. It is obvious that if there was no evidence in the case that the conductor had participated in the quarrel and had done nothing to precipitate the fight, no liability could be fastened upon the company. But the evidence is clear that the conductor used foul language in scolding or abusing the driver of the ambulance. It is contended by the learned counsel for the defendant that the court cannot presume that the ambulance driver heard these words or was thereby incited to pursue the car, jump on the platform and attack the conductor.

On a motion for a nonsuit the plaintiff is entitled to the most favorable inferences from the undisputed testimony. (*McNally v. Ins. Co.*, 137 N. Y. 389; *Costello v. Third Ave. R. R. Co.*, 161 N. Y. 217, 7 Am. Neg. Rep. 317). This, of course, does not mean conjecture, but reasonable inferences from established facts by the exercise of common sense and experience. The conductor and driver were engaged in a wrangle, the car passed on, the driver pursued and jumped on the car and fiercely attacked the conductor. The latter, instead of standing his ground and taking advantage of his elevated position on the platform, retreated and transferred the fight to the inside of the car to the obvious danger of innocent passengers. Would it not be a legitimate inference from the pursuit of the car and the sharp attack by the ambulance driver, that these occurrences were the result of the abuse in which the conductor had indulged? Would it not be proper for a court to charge a jury (if this were a jury trial) that it was competent for the jury to draw the inference from the circumstances and the progress of the quarrel that the abusive language had induced the attack and therefore was a proximate cause of the injury?

Suppose the fight had become an affray in which pistols were drawn and a passenger was shot and killed. Could there be any doubt that the company would be justly held responsible if it appeared that an assault upon the conductor immediately followed a torrent of abuse?

While the evidence in the case shows that the ambulance driver seemed to be the aggressor in the actual fight, yet the injury so

closely followed the misconduct of the conductor as to lead to a fair inference that it was induced or caused by lack of self control or want of care which the law imposes upon a servant of a carrier. The court ought not to indulge in nice distinctions as to whether the conductor or the stranger was the aggressor. It is enough that the conductor took an active part in the quarrel which, it might reasonably be anticipated, would result in a breach of the peace and injury to passengers.

It is almost impossible to estimate in money the damages sustained by the plaintiff, on account of lack of proof that her present condition is the result of her injuries.

I have come to the conclusion, however, that the claim should be allowed in the sum of \$600 (six hundred dollars).

BROWN V. WEST RIVERSIDE COAL COMPANY.

Supreme Court, Iowa, April, 1909.

MASTER AND SERVANT—COAL MINE—EXPLOSION OF DYNAMITE—CARE REQUIRED OF MINE OPERATOR.—

In an action for damages for death of plaintiff's intestate, an employee in defendant's coal mine, caused by explosion of dynamite used for blasting purposes in the mine, the rule was stated that defendant was bound to exercise reasonable care commensurate with the known danger of the instrumentality employed and the seriousness of the consequences liable to follow the omission of such care (1).

STORAGE OF EXPLOSIVES IN COAL MINE—DANGEROUS CONDITION OF WORKPLACE—QUESTION FOR JURY.—

The question whether it was negligence to store powder and dynamite in dangerous quantities in a coal mine in the only room provided for the use of the workmen for refuge from storm and for keeping their tools, clothing and lunches, and whether defendant exercised its full duty to protect its workmen from danger, were questions of fact for the jury to determine.

SAME—NEGLIGENCE—EXTRAORDINARY OCCURRENCE.—

Nor was negligence negatived by the fact that the explosion of dynamite so stored in defendant's coal mine was an unusual or extraordinary occurrence.

1. For the duties and liabilities arising out of the relations of Master and Servant, see the AMERICAN NEGLIGENCE DIGEST (1909 edition), under the titles of MASTER AND SERVANT, MINES, RAILROAD COMPANY.

ASSUMPTION OF RISK, RISK OF EMPLOYMENT, CONTRIBUTORY NEGLIGENCE, and kindred topics, the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) being collated in said Digest.

NEGLIGENCE—BURDEN OF PROOF.—A plaintiff is not required to make his case beyond a reasonable doubt, it being sufficient if the circumstances be such as to justify a reasonable inference of the truth of the matters charged.

WORKMAN KILLED IN COAL MINE—EXPLOSION OF DYNAMITE—STORM—LIGHTNING—EVIDENCE—PROXIMATE CAUSE.—In an action for the death of a workman in defendant's coal mine caused by an explosion of dynamite, it appeared that deceased was in charge of a hoisting engine situated near a shanty where the workmen left their tools, also their lunches, and gathered there for shelter from storms; that defendant stored quantities of powder and dynamite there; that at the time of the explosion a violent rainstorm, accompanied by thunder and lightning, was in progress; that it was supposed the workmen had gone to the shanty for shelter from the storm, and that the explosives were ignited by lightning; that the body of deceased was found about thirty feet from his engine and forty feet from the shanty, his legs torn off but the remainder of his body was not mutilated, and there were no powder marks on his face; and that the bodies of his four comrades were for the most part torn in fragments. *Held*, that a finding by the jury that the deceased was killed by the explosion of the powder and dynamite and not by a lightning stroke, was amply supported in the record (2).

EXPLOSIVES STORED IN MINE—TELEPHONE—DANGEROUS WORKPLACE—EVIDENCE.—Where negligence was charged not only in keeping the explosives in the shanty, but also that the danger was increased by defendant establishing a telephone in the same room with connecting wires, upon which in case of storms an overcharge of electricity was liable to be conducted causing ignition of the explosives, proof of a condition which rendered such results possible was a material circumstance with reference to the safety of the place.

NEGLIGENCE—ACT OF GOD—PROXIMATE CAUSE—LIABILITY.—When negligence of a responsible person concurs with a flood or storm or other so-called "act of God" in producing an injury, the party guilty of such negligence is liable for the injurious consequences, if the injury would not have happened but for his failure to exercise care (3).

NEGLIGENCE—INJURY TO SERVANT—PROXIMATE CAUSE.—If the defendant was negligent in depositing the powder and dynamite in a place where their accidental ignition would necessarily

2. For other mining accidents see Vols. 1-20 Am. Neg. Rep. (1897-1907), and the American Negligence Digest (1909 edition) under the title "Mines."

See also, at end of this case, Notes of recent mining accident cases.

3. For similar rulings in cases in which "act of God" was interposed as a defense, see the AMERICAN NEGLIGENCE DIGEST (1909 edition) title, "Act of God," where the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907) are collated. See, also, Note in 15 AM. NEG. REP. 360-372.

endanger the lives of its servants, such negligence would be the proximate cause of the resulting injury, notwithstanding the source of the spark which exploded them was purely accidental or wholly unknown.

DEGREE OF CARE—NEGLIGENCE.—If there be lack of reasonable care on the part of the master in storing explosives too near the servant's place of work, such negligence is not purged by the exercise of care in other respects.

DEATH—PRESUMPTION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—In the utter absence of living witnesses to the accident in defendant's coal mine, there is a presumption that the deceased, actuated by the natural instincts of self-preservation, was in the exercise of reasonable care for his own safety, and the question of contributory negligence was properly left to the jury.

ASSUMPTION OF RISK.—A servant assumes all risks which inhere in or are incident to the nature and kind of service which he undertakes to perform, and, if such service involves the use of explosives or other dangerous instrumentalities, he takes upon himself the chances of all injury to which he may be exposed by their reasonable and proper use; but he does not assume any risk created by the negligence of his master unless he knows and appreciates, or as a reasonably prudent person ought to know and appreciate, the peril arising therefrom, and chooses to remain in the service, in which latter event he is barred from the recovery of damage if injured (4).

ASSUMPTION OF RISK—PLEADING—BURDEN OF PROOF.—Assumption of risk on account of the master's negligence is an affirmative defense, the burden of proof being upon the master.

ASSUMPTION OF RISK—QUESTION FOR JURY.—It is for the jury to determine the issue of assumption of risk, unless the opposing view is one upon which reasonable minds are not likely to differ.

EMPLOYEE IN MINE KILLED BY EXPLOSION—ASSUMPTION OF RISK—QUESTION FOR JURY.—Where an employee was killed by an explosion of dynamite negligently stored in a room used by workmen in defendant's coal mine, the question whether deceased assumed the risk was for the jury to determine from the evidence.

APPEAL from District Court, Polk County.

ACTION to recover damages for the death of plaintiff's intestate. From judgment for plaintiff defendant appeals. The facts are sufficiently stated in the opinion. *Judgment affirmed.*

PARKER, HEWITT & WRIGHT, for appellant.

THOS. A. CHESHIRE, for appellee.

4. For the doctrine of Assumption of Risk, see the AMERICAN NEGLIGENCE DIGEST (1909 edition), titles, Master and Servant, Risk of Employment, Assumption of Risk, etc., the Digest covering the cases reported in Vols. 1-20 AM. NEG. REP. (1897-1907).

WEAVER, J. — The defendant, a coal mining corporation, was engaged in the work of sinking a shaft for mining purposes near the city of Des Moines. The deceased was not a miner by occupation, but had for a short time been employed by the defendant doing work at and about the top of the shaft. After a few weeks of this service, he was put in charge of an engine used in hoisting the excavated material. This engine was not inclosed by any building; the only shelter for the engineer being a small roof or canopy not affording protection against severe storms. The boiler and engine stood north of the shaft, and about sixty feet farther to the north and west was a small frame shanty or building about ten feet square in which was a telephone connected with the city system. It was also used as a place where the workman left their coats and tools, where they sometimes gathered at lunch time and found shelter from the storms. In it the defendants also deposited powder and dynamite supplied from time to time for use in blasting. The work was being pushed both day and night; the men being employed in three shifts of eight hours each. The deceased was upon the night shift. At least twenty-five pounds of dynamite were used every twenty-four hours, and, instead of having large quantities of the explosive stored in advance, it was the practice to purchase and bring in boxes of twenty-five to fifty pounds each as the progress of the work required, and these boxes were stored in the shanty above described. For some time prior to the date in question, little or no black powder had been used, and a remnant of some twenty-five or more pounds of that material had been permitted to remain in the same room. On July 17, 1905, a twenty-five-pound box of dynamite was delivered, not more than one-half of which had been used at the time of the accident. There was also a supply of dynamite caps for use in exploding blasts. Brown knew, in a general way, at least, of the uses made of the shanty. At times he attended to telephone calls and sometimes carried powder and dynamite from the building to the shaft.

Early in the morning of July 19, 1905, and before the night shift of workmen had been relieved, there occurred a violent rain-storm, accompanied by thunder and lightning, during which the dynamite and powder in the shanty exploded, instantly killing Brown and his four fellow workmen constituting the entire force then on the work. It is supposed that some, if not all, of the number had gathered in the shanty for shelter from the storm, and that the explosives were ignited by a stroke of lightning. There is no living witness of any of the immediate circumstances of this calamitous

tributary to his death. This motion being over-
 offered evidence tending to show the general
 work at and about the shaft had been carried
 deceased was in its service, the use to which
 narily put, and the knowledge and notice which
 conditions there prevailing. The motion for a
 thereupon renewed and again overruled. Cer-
 structions to the jury were also submitted to the
 After verdict had been returned for the plain-
 moved for a new trial, assigning as grounds the
 of the trial court in its rulings and instructions
 the evidence to sustain a recovery of damages.
 denied and judgment entered on the verdict, the

1. The first assignment of error argued by
 upon the refusal of the trial court to hold as
 plaintiff had failed to establish any negligence of
 defendant with respect to the matters alleged in
 ment would hardly seem necessary to show the
 proposition. There is, of course, no negligence
 that defendant employed explosives in sinking the
 for such is the usual and approved, if not a new
 which work of this kind is accomplished; but the
 gerous instrumentalities may be properly used with
 employer to a charge of negligence does not hold
 that he is discharged from the ordinary obligation
 care to protect his servants against injury.
 reasonable care demands increased watchfulness
 in proportion to the dangerous nature of the
 ployed; that is, "due care" means care which
 mensurate with a known danger and the serious
 sequences which are liable to follow its omission.
 familiar and fundamental in the law of negligence
 discussion or array of authorities. The negligence
 case is not founded upon the use of explosives
 of the defendant's work, but in the alleged lack of
 and storing them. This, under all ordinary
 question of fact. For the court to say as a matter
 powder, dynamite, and dynamite caps in dangerous
 same and only room provided for the use of
 refuge from the storm and keeping their tools, that
 the defendant exercised the full measure of its duty
 would in our judgment be a very serious error

time-honored province of the jury. . It is no answer to this charge that there was no other convenient place to keep these explosives. The construction of a sufficient shelter or receptacle for that purpose, detached from the assembling place of the workmen, was a matter of but few moments', or at the most few hours' work, and very slight expense, and, to say the very least, the question whether reasonable care did not require such precaution was a fair one for the consideration of the triers of fact. Nor is negligence negated by the fact that the explosion was an unusual or extraordinary occurrence — if there was negligence in creating the conditions. *Dulligan v. Barber Asphalt Paving Co. (Mass.)* 87 N. E. 567 (5).

5. *DULLIGAN v. BARBER ASPHALT PAVING CO.*, (*Massachusetts*, February, 1909) 87 N. E. 567, was an action for the death of an employee caused by an explosion of one of defendant's asphalt tanks. The declaration contained two counts, one to recover under Rev. Stat. c. 106, for death occasioned by negligence of defendant's superintendent, and the other to recover for conscious suffering of plaintiff's intestate arising from common-law negligence of defendant. Both counts were joined in one cause of action under Stat. 1906, p. 345, c. 370. In the Superior Court, Middlesex county, a verdict was directed for defendant on the first count. Plaintiff excepted. Defendant excepted to refusal of court to direct verdict in its favor on second count. The Supreme Court sustained plaintiff's exceptions and overruled defendant's exceptions. The opinion was delivered by Rugg, J., and the case was stated as follows:

"There was evidence tending to show that the plaintiff's intestate was a licensed fireman and had been employed by the defendant upon another branch of its work in a different locality until the night before the accident, when the superintendent of the defendant placed him at work at the asphalt tank. This apparatus was called a

"single car asphalt plant," and consisted of the wheels and frame of a long platform railroad freight car, upon which were placed three tanks for the heating or mixing of asphalt, under each of which was a furnace. Each tank was fitted with a lid or cover. There was also upon the car a gasoline engine and a steam boiler, together with certain other machinery. The defendant's superintendent, when he placed the plaintiff's intestate at work showed him the steam boiler, and told him to keep the steam up so that nothing would freeze, and showed him also the asphalt tanks, and directed him to keep the cover up on a clear night, and on a rainy night to put in a barrel stave, which would keep them four or five inches up. He also gave directions as to keeping the fires under the asphalt tanks, and handed him a thermometer, for the purpose of taking the temperature of the material in the tanks, and a lantern. In order to take this temperature, it was necessary for him to climb by a ladder to the top of the tanks, and with a lighted lantern examine the thermometer which was a tube about five feet in length, and which, when he was taking the temperature, protruded about two feet above the tank, the

2. It is also argued that, even if the defendant was negligent in keeping the explosives in the shanty, we are without a basis from which to find that this failure of duty was the proximate cause of the disaster. "Who can tell," counsel asks, "whether lightning, or the carelessness of the workmen, or the cause of the explosion — whether lightning, or the carelessness of the workmen, or the stroke was not itself fatal to the defendant, independent of the resulting explosion? If the explosion resulted by the explosion of the powder and the tanks were discharged by a bolt of electricity, is not this an intervening agency which breaks the line of causation? The defendant's negligence and the death of the plaintiff are independent. The argument is a plausible one, but we think it is not sound."

lower part being in the asphalt. No instructions were given as to what should be done if the covers were found down, nor did it appear that anything was said as to how frequently the temperature should be taken. When the plaintiff's intestate went to work on the night in question the lids of the tanks were closed, although it did not appear that he knew this until he went up on the ladder two or more hours later for the purpose of taking the temperature. On opening one of the lids an explosion occurred, which caused the injuries of which he subsequently died. There was also evidence tending to show that the asphalt and other materials, which were heated in the tanks, generated an explosive gas, which when overheated or in contact with flame would be likely to cause an explosion. The defendant's superintendent testified that in an experience of many years he had never known an explosion of this sort, and did not know that it was likely to occur. This evidence, however, the jury were not bound to believe, and if believed it was not conclusive upon the issues before them.

"One question for the jury was whether the defendant, in the exercise of reasonable care, could have known that an explosion would occur unless the tanks were properly vented. The court said that, if the defendant was found to be pounding a sledgehammer on a considerable heat and a considerable chemical process was set in motion of heat and petroleum products, it was the duty of the defendant, in the exercise of prudence, to take proper precautions to prevent the generation of dangerous gases, and to require precautions to prevent their harmless ventilation of a dangerous quantity of gas. Jolly, 167 Mass. 639, 45 N. E. 2d 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 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1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 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It is very true that it is not within human power to discover and make known with certainty all of the immediate circumstances attendant upon this tragedy, but such exact and detailed proof is not required. Courts and juries are not infrequently confronted by cases in which the ultimate facts of cause and effect are to be found, not so much from direct proof of the circumstances as they exist at the instant of the injury complained of, as from proof of conditions existing before and after its occurrence. For instance, in the recent case of *Lunde v. Cudahy Packing Co.* (Iowa) 117 N. W. 1063, the body of the deceased was found upon the floor of the room in which he was employed, and there had been no eyewitness of the cause or manner of his death, yet the circumstances were such as to show with moral certainty that he had fallen into the wheel pit, through

currence as to be unknown to men engaged in the business for a period of many years, then the defendant was not responsible for it. This is obviously unsound. It might well be that no such explosion had been known of in the defendant's business because proper care had always theretofore been taken to avoid such a calamity. Moreover, the standard, which the law establishes, is the exercise of reasonable prudence, and not experience in or knowledge of accident of a similar character. The test is whether the conditions, which led to an extraordinary or even unprecedented accident, were such that no reasonably prudent proprietor would have suffered to exist. The particular manifestation of the result of careless conditions is not infrequently quite out of the usual experience, but if the conditions which bring it about have elements of negligence about them, the person responsible for the conditions may also be held responsible for the result. See, for example, *Herlihy v. Little*, 86 N. E. 294; *Turner v. Page*, 186 Mass. 600, 72 N. E. 329; *Lane v. Atlantic Works*, 111 Mass. 136 (15 Am. Neg. Cas. 709n); *Slattery v. Lawrence*

Ice Co., 190 Mass. 79, 76 N. E. 459, 19 Am. Neg. Rep. 298; *Powell v. Deveney*, 3 Cush. 300; *Erickson v. American Steel & Wire Co.*, 193 Mass. 119, 125, 78 N. E. 761; *Derry v. Flitner*, 118 Mass. 131; *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183, 10 Am. Neg. Rep. 97. The eleventh and twelfth prayers were properly refused, because there was no evidence that the plaintiff's intestate was instructed, or that it was a part of his duty to look at the tank covers before it became his duty to take the temperature of the contents of the tanks and there was nothing to show that he failed to do this earlier than his duty required. It cannot be said that the plaintiff's intestate was negligent, or that he assumed the risk of injury. The jury might have found that he was doing his work, lantern in hand, as he had been instructed to do it. The danger to which he was subjected was one as to which he had no knowledge, or experience, or appreciation, according to his declaration shortly after the explosion, which the jury might have believed. The defendant's other prayers were properly refused." * * *

which he had been whirled upon the spokes of the wheel and sent flying out again (6). The plaintiff is not required to show that there is a reasonable doubt. It is sufficient if the circumstances justify a reasonable inference of the truth of the proposition. 2 Encyc. Evidence, p. 956.

In most cases the relation between cause and effect is one of inference only, but the conclusion is none the less a matter for the reasonable mind. A finding that the life of the plaintiff was destroyed by the explosion of the pipe and not by the lightning stroke, has ample support. The place where the body was found and the manner of dismemberment point unmistakably to the explosion.

6. In *LUNDE v. CUDAHY PACKING Co.*, (Iowa, October, 1908) 117 N. W. 1063, plaintiff recovered judgment in action for death of an employee, seventeen years of age, engaged to work in the engine room of defendant's works, caused by alleged negligence of defendant. Judgment was affirmed on appeal. Opinion by WEAVER, J. On the point of direct proof the court said:

"Other points, made in behalf of the appellant, may be condensed in the proposition that the verdict is not sustained by the evidence. With this contention we cannot agree. For reasons already stated we are satisfied that both upon this alleged failure of the defendant to furnish the deceased a reasonably safe place to work, and upon the question whether reasonable care was exercised to properly instruct and warn him concerning the dangers to which he was exposed, there was enough evidence to go to the jury. Upon the question of contributory negligence, the jury, under the rule discussed in the fourth paragraph of this opinion, were justified in finding that his death was not in any degree chargeable to his own want of reasonable care. But the counsel say that, even if we con-

cede the allegations of the defendant, there is no connection between the negligence and the death. It is claimed that no evidence is shown to testify to the cause of the accident, and the manner of the death. The state must be satisfied from the facts developed on the case. Counsel, leave the accident a matter of speculation or surmise. The case. No other evidence than the any disputed fact, dependent, in the case, upon the evidence. It is of course the guide; neither the testimony of human experience in its sufficiency of cause of any matter of alarm by the courts.

While not necessary of the finding that the death was the proximate cause of the case.

explanation of the cause of his death, while there is not the slightest circumstance to support the theory that he was killed by lightning. In *Brownfield v. C., R. I. & P. R. R. Co.*, 107 Iowa, 254, 258, 5 Am. Neg. Rep. 331, 334, 77 N. W. 1038, we stated the rule to be that: "When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." It is here shown without dispute that the explosives were in the shanty, that they were discharged wrecking the building, and that the persons first coming to the scene of destruction found the bodies, or the remnants of the bodies, of the five workmen scattered in and

thing more than a mere possibility or conjecture, this court said "It is equally well established that the cause of an accident may be inferred from circumstances," and sustained a verdict for the plaintiff. While plaintiff cannot recover upon a case which does no more than show a possibility that the injury is chargeable to the defendant's negligence, he is not bound to prove either the negligence or the proximate cause beyond a reasonable doubt. Such a rule would work an absolute denial of justice in a great majority of cases. Proximate cause is, under all ordinary circumstances, a question of fact; and, where it depends upon circumstances from which different minds might reasonably draw different conclusions, or where all the known facts point to the negligence of the defendant as the cause, the submission of the question to the jury affords no ground for assignment of error by such defendant. 29 Cyc. 632.

"Proof of proximate cause is subject to no more burdensome rule than is applied to the proof of any other essential fact in an ordinary law action. It must be established by a preponderance of the evidence, direct or circumstantial.

If there be shown any facts bearing upon the question, and they afford room for fair-minded men to conclude therefrom that one theory of the case is better supported than the other, the question cannot be properly withdrawn from the jury." * * *

"In our judgment the record before us presents a case which would justify a jury in finding that the wheel pit was not properly guarded, that the opening left below the lower rail was such as to expose the deceased to the danger of slipping or falling from the cement path into the pit and upon the wheel, and that the bruise upon the rail, the rope pulled from the shive into the pit from the east passageway, the blood spots, and the place where the body was thrown, are facts from which the jury could fairly find that he did thus fall, while attempting to make his way along said path. A cause being shown which might produce an accident, and it further appearing that an accident of that particular character did occur, it is a warrantable inference, in the absence of showing of other cause, that the one known was the operative agency in bringing about such results." * * *

about the ruins. No other efficient cause for such results is shown, and to argue the possibility that these men were stricken dead by lightning is to indulge in conjecture pure and simple. Nor are we able to say that, if the explosives were discharged by an electric bolt entering the building, it demonstrates the intervention of an independent agency which breaks the line of causation from defendant's negligent act and renders the death of the deceased so clearly accidental or providential that no right of recovery exists. This feature of the case presents a question upon which there is much confusion in the authorities, and decisions may readily be found that, where some uncontrollable manifestation of nature unites with human negligence in causing injury to persons or property, the negligence of the human agent is treated as a condition, and not a cause of the injury, and relieves him from legal liability. The origin of this rule is hinted at in the ancient formula by which every destructive exhibition of the laws of nature was denominated "an act of God," from which idea it was easy to reach the pious conclusion that an injury which had been caused or contributed to by the hand of God ought not to be made the basis for the recovery of damages before human tribunals; but this theory has been discarded by many courts, and among them is our own. The subject was treated with great thoroughness by Mr. Justice McClain in *Shoe Co. v. Railroad Co.*, 130 Iowa, 123, 106 N. W. 498, and by Mr. Justice Deemer in *Vyse v. Railroad Co.*, 126 Iowa, 99, 101 N. W. 736. The rule is there laid down that, when negligence of a responsible person concurs with a flood or storm or other so-called "act of God" in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences, if the injury would not have happened but for his failure to exercise care. These precedents are of such recent date, and treat the subject so exhaustively, that we need not here reopen the discussion farther than to say we are still satisfied with the legal and logical soundness of the rule there announced. That a person whose negligence is the primary cause is not excused because a stroke of lightning intervenes to precipitate an injury, see *Jackson v. Telephone Co.*, 88 Wis. 243, 60 N. W. 430. The general subject of proximate cause and intervening agencies in cases of negligence is also treated quite fully in *Burk v. Creamery Package Mfg. Co.*, 126 Iowa, 730, 18 Am. Neg. Rep. 62, 102 N. W. 793; *Fishburn v. B. & N. W. R. Co.*, 127 Iowa, 483, 17 Am. Neg. Rep. 270, 103 N. W. 481; *Phinney v. Ill. Cent. R. Co.*, 122 Iowa, 488, 17 Am. Neg. Rep. 303, 98 N. W. 358; *Gould v. Schermer*, 101 Iowa, 588, 2 Am. Neg. Rep. 136, 70 N. W. 697.

It is to be observed in this connection, that plaintiff charges the defendant not only with negligence in keeping the explosives in the shanty, but also alleges that it negligently increased the hazard thus created by establishing a telephone in the same room with connecting wire or wires, upon which in case of storms an overcharge of electricity was liable to be conducted causing the ignition of the powder, dynamite, or caps. The fact of installing and connecting the telephone as alleged is not denied, but it is said there is no evidence that this condition had anything to do with the accident. No witness testifies — none can testify — that lightning did strike the building, or that electricity in dangerous force did enter it over the wire; but proof of a condition which rendered such results possible was a material circumstance with reference to the safety of the place. See *Jackson v. Telephone Co.*, 88 Wis. 243, 60 N. W. 430. The liability of telephone wires to be surcharged with electricity during violent storms is well known to all persons familiar with their use. It is shown by plaintiff's witnesses that the broken end of this particular wire continued to emit sparks for some time after the explosion, indicating that by reason of the condition of the atmosphere, or because of contact with other conductors carrying heavy currents, electricity in quantities capable of doing the alleged mischief was being brought into the immediate vicinity where the explosives had been stored; but we think it is not incumbent upon the plaintiff to point out or demonstrate the manner in which the explosives were ignited. Indeed it would not necessarily be a defense to the action, even if the record should demonstrate beyond all doubt that the immediate cause of the explosion was not chargeable to the negligence of any person. If the defendant was negligent in depositing the powder and dynamite in a place where their accidental ignition would necessarily endanger the lives of its servants, such negligence would be the proximate cause of the resulting injury, notwithstanding the source of the spark which explodes them be purely accidental or wholly unknown. *Tissue v. Railroad Co.*, 112 Pa. St. 91, 3 Atl. 667. That blasting powder and other high-power explosives of modern invention are liable to accidental ignition, with destructive consequences, even where apparently reasonable care is exercised to prevent such occurrence, has been too frequently proven by recurring disasters to call for argument, and, if there be lack of reasonable care in storing them too near the servant's place of work, such negligence is not purged by the exercise of care in other respects.

3. As in all personal injury cases, there must be testimony from

which the jury can properly find freedom from contributory negligence on the part of the deceased in order to sustain a recovery of damages. In this respect it is contended that the plaintiff has failed. It must be remembered however, that in the utter absence of living witnesses there is a presumption that the deceased, actuated by the natural instincts of self-preservation, was in the exercise of reasonable care for his own safety. *Phinney v. Ill. Cent. R. Co.*, 122 Iowa, 492, 98 N. W. 358, 17 Am. Neg. Rep. 303; *Hopkinson v. Knapp & Spalding Co.*, 92 Iowa, 328, 14 Am. Neg. Cas. 568, 60 N. W. 653; *Dalton v. R. R. Co.* 104 Iowa, 26, 73 N. W. 349; *Mynning v. Det., L. & N. R. Co.*, 64 Mich. 93, 31 N. W. 147, 12 Am. Neg. Cas. 116n; *Lyman v. Railroad Co.*, 66 N. H. 200, 20 Atl. 976; *Cassidy v. Angell*, 12 R. I. 447; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 12 Am. Neg. Cas. 336. True, this presumption is not conclusive and may be rebutted by proof of circumstances tending to the opposite conclusion, but such proof can rarely, if ever, be made so clear and unmistakable as to enable the court to dispose of the issue thus presented as a matter of law. We find no such showing here, nor do counsel point out any fact or circumstance which they rely upon to overcome this presumption. Even if it should be said that reasonable care on the part of the deceased would have forbidden his entrance to the shanty under the circumstances then surrounding him, it is a sufficient answer that it is by no means certain that he did enter or was in the building when the explosion occurred. The question of contributory negligence was properly left to the jury.

4. The conclusions already announced dispose of the principal issues presented in this case, except the defense of assumption of risk pleaded by the defendant. It is a familiar doctrine that the servant assumes all risks which inhere in or are incident to the nature and kind of service which he undertakes to perform, and, if such service involves the use of explosives or other dangerous instrumentalities, he takes upon himself the chances of all injury to which he may be exposed by their reasonable and proper use; but, as we have often had occasion to say, the servant does not assume any risk created by the negligence of his master unless he knows and appreciates, or as a reasonably prudent person ought to know and appreciate, the peril arising from the master's negligence, and chooses to remain in the service, in which latter event he is barred from the recovery of damage if injured. Assumption of risks on account of the master's negligence is an affirmative defense. It has been properly pleaded in the case before us and presents the most seriously debatable question argued by counsel. A careful consideration of

the record inclines us to the view that in this, as in other respects mentioned, there was no error in submitting the issue to the jury. It must not be overlooked that, as already stated, this defense is affirmative in character, and that the issue thus presented is one of fact on which the parties are entitled to have a verdict unless the opposing view is one upon which reasonable minds are not likely to differ. The testimony tends to show that, until coming into the service of the defendant, Brown had no experience in mining or in sinking mine shafts. It does not appear that he had any prior experience in works of excavation or in the care or use of explosives. He had been a butcher farmer, and had had some experience with threshing machines. The boiler he was using at the defendant's mining shafts was part of a threshing outfit belonging to him. While it is shown that at times, though not repeatedly, he carried dynamite from the shanty to the shaft, and doubtless knew in a general way that it was a powerful explosive, it is at least doubtful whether he was aware of its sensitive character or understood the gravity of the peril to which those working in the vicinity were thereby exposed. The seeming indifference or confidence manifested by the defendant's managers in depositing and keeping these materials in the same shelter provided for the use and convenience of the workmen would naturally quiet the fears of an inexperienced employee. So far as shown, he was given no instructions or warning concerning the danger to be apprehended from this source. There is no charge of negligence in failing to warn or instruct the deceased with respect to this danger, but, in considering his conduct with reference to the question of assumption of risk, the fact whether he did have such notice or warning is relevant and material, because the rule as to assumption of risk has its basis in the servant's actual or constructive knowledge of the peril to which he is exposed. *Reed v. Stockmeyer*, 74 Fed. 186, 20 C. C. A. 381. See, also, cases collected in 2 Labatt's Master and Servant, § 271, note. Bearing upon the care required of the master in keeping and handling explosives and assumption of risk therefrom by the servant, the case of *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, and *Welch v. Bath Iron Works*, 98 Me. 361, 15 Am. Neg. Rep. 564, 57 Atl. 88, are quite in point. In view therefore of all the circumstances disclosed by the record and the law which places the burden of establishing this defense upon the master, we cannot say there was any error in submitting it to the finding of the jury.

5. Other questions argued by counsel are incidental or subsidiary to those already considered, and we shall not attempt their minute

consideration. It is argued, and for the purpose of the case it may be conceded, that defendant is not necessarily chargeable with negligence because it kept dynamite near the shaft, or because it installed the telephone in the shanty for the convenience of its business; but it does not follow from this concession that the use of a single small room for the installation of the telephone, for the deposit of the explosives, and for the general convenience and shelter of the workmen, did not together constitute a dangerous combination which due care would have avoided.

In one of its instructions to the jury, the court, as the record would seem to indicate, used the word "prudent" where it evidently intended to say "imprudent;" but the whole trend and substance of the charge makes the inadvertence so very clear that we cannot conceive of any juror of average intelligence being thereby misled, and it is incredible that the defendant suffered any prejudice therefrom. We have often held that mere verbal inaccuracies of this kind are not reversible errors. *Flam v. Lee*, 116 Iowa, 289, 90 N. W. 70; *Meyer v. Baird*, 120 Iowa, 597, 94 N. W. 1129; *Schaefer v. Insurance Co.*, 133 Iowa, 205, 100 N. W. 857; *Smith v. Insurance Co.*, 115 Iowa, 217, 88 N. W. 368.

No ground for setting aside the verdict being shown, the judgment of the district court is therefore affirmed.

NOTES OF MINING ACCIDENTS CASES.

In connection with the case of *BROWN v. WEST RIVERSIDE COAL CO.*, (*Iowa*, 1909) 120 N. W. 732, 21 Am. Neg. Rep. 646, (preceding case reported herein) see the following "Mining Accidents Cases":

Alabama.

Falling object — Roof of mine — Pleading and proof — Variance.

In *TENNESSEE COAL, IRON & R. R. CO. v. GEORGE*, (*Alabama*, May, 1909) 49 So. Rep. 681, judgment for plaintiff in the City Court of Bessemer, in action for injuries sustained by falling material from roof of defendant's mine, was reversed for variance in pleading and proof. "The complaint charges plaintiff's injuries to the negligence of the defendant's foreman 'Bill Nolan,' and the proof shows that the name of the foreman was 'Will Knowles.' This was a fatal variance, which was raised by the general charge, requested by the defendant, and which should have been given." Opinion by ANDERSON, J.

Blasting in ore mine — Pleading insufficient.

In *BIRMINGHAM ORE & MINING CO. v. GROVER*, (*Alabama*, February, 1909) 48 So. Rep. 682, judgment for plaintiff in the City Court of Birmingham, in action for injuries sustained while at defendant's ore mine, caused by blasting

by defendant's servants, judgment was *reversed* for insufficient pleading. Plaintiff was a brakeman in the employ of the Louisville & Nashville Railroad Company which operated trains over a spur track to defendant's mine for the purpose of transporting ore from the mine. While engaged in his duties a blast was fired by defendant's servants and plaintiff was injured. The court (per SIMPSON, J.) said:

"While it is not necessary to aver that the party doing the blasting had actual knowledge of the proximity of the person injured, yet it is necessary to allege that he either knew, had reason to believe, or could by reasonable diligence have known, that the party injured was in a position where the missiles from the blasting would probably reach and injure him," and the trial court erred in overruling the demurrer.

Colorado.

Miner killed by falling rock from roof of mine — Master liable.

In *NORTHERN COAL & COKE CO. v. ALLERA*, (*Colorado Supreme*, July, 1909) 104 Pac. 197, judgment for plaintiff in the District Court, Boulder county, was *affirmed*. "The plaintiff's husband, a miner, was working for defendant company in its coal mine. He and several other workmen were directed by the shift boss to go into a room or chamber of the mine from which the coal had been taken and shoot down a stump or pillar of coal that was still standing there as a support of the roof, and afterwards to remove the debris and clear out the entry or passageway which led to the chamber. While doing this work, as the complaint states, plaintiff's husband was killed by a rock which fell upon him from the roof of this passageway while he was engaged in an inspection to ascertain the result of the shot, which inspection constituted a necessary part of the work in hand." Opinion by CAMPBELL, J. Judgment for \$3,250 not excessive. *Rehearing denied*, October 4, 1909.

Illinois.

Falling object from roof of mine — Master liable.

In *PEEBLES v. O'GARA COAL CO.*, (*Illinois Supreme*, April, 1909) 88 N. E. 166, judgment for plaintiff was *affirmed*, the opinion by CARTER, J., stating the case as follows:

"This is an action on the case brought by defendant in error in the Circuit Court of Saline county to recover damages for injuries sustained by him while at work as a miner in plaintiff in error's mine August 13, 1906. The declaration originally consisted of four counts. The third count having been withdrawn by defendant in error, the case was tried on the first, second, and fourth counts, and plaintiff in error was found guilty by the jury on the first and fourth only; the verdict and judgment being for \$1,500. This judgment was affirmed by the Appellate Court on appeal, and a writ of error has been sued out from this court. The first count was based on a violation of paragraph 'a' of section 16 of the Mines and Miners' Act (Hurd's Rev. St. 1908, p. 1434, c. 93), and charged that the plaintiff in error wilfully and knowingly failed and neglected to provide defendant in error with a sufficient supply of props, caps, and timbers, after demand by him therefor, as nearly as possible in suitable lengths, etc., for securing his working place, whereby a large quantity of rock and

slate fell from the roof of said place and injured him. The fourth count, based on paragraph 'b' of section 18 of the Mines and Miners' Act (Hurd's Rev. St. 1908, p. 1436), charged that on the morning of the day defendant in error was injured, and before he entered the mine to work, his working place was in a dangerous condition, and that plaintiff in error wilfully permitted, suffered, and allowed him to enter his working place to work therein without the directions or without being under the directions of the mine manager before said dangerous place was made safe.

"The proof shows that the defendant in error was a coal miner, forty-nine years of age, and was employed at the time of the accident, and for several months theretofore, in plaintiff in error's mine; that the coal was mined by being cut loose with a machine and then shot down, usually with three shots, the one in the centre being called the 'breakdown shot'; that the evening before the injury defendant in error, with the assistance of his son, who was working with him, fired three shots, but could not see the condition of the roof on account of the smoke; that on going to work the next morning he found the shots had knocked the coal down on the right and left sides, but that part of the centre shot was still standing against the roof and a piece of loose slate or rock was projecting about three and a half feet; that during the afternoon, after trying without success, to pull the slate down, he started to mine down the coal which had been left standing, but struck only once with his pick when the piece of slate loosened, swung around, fell on his leg, and broke it; that he was otherwise bruised and injured, and had been able to work only about two weeks from the time of the accident to the time of the trial, some thirteen months." * * *

"Plaintiff in error does contend, however, that the proof shows that the proximate cause of the injury was not the wilful violation of the Mining Act by plaintiff in error, but the fact that defendant in error wilfully, intentionally, and deliberately struck his pick into the coal knowing its condition, and that hence no recovery can be had. It cannot be argued from this record that defendant in error struck his pick into this coal with the intention of pulling it down upon himself and breaking his leg. The argument of counsel for plaintiff in error is plainly an attempt to avoid the conclusions necessarily drawn from the former decisions of this court in construing the Act here under consideration as to contributory negligence. Such negligence by the injured person is no defense to an action based upon the mine owner's wilful failure to carry out the provisions of said Act. *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N. E. 375, 20 Am. Neg. Rep. 62; *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N. E. 902, 20 Am. Neg. Rep. 60; *Eldorado Coal Co. v. Swan*, 227 Ill. 586, 81 N. E. 681; *Davis v. Illinois Collieries Co.*, 232 Ill. 284, 83 N. E. 836; *Mertens v. Southern Coal Co.*, 235 Ill. 540, 85 N. E. 743; *Olson v. Kelly Coal Co.*, 236 Ill. 502, 86 N. E. 88. The question here involved has been so fully and exhaustively discussed in these cases that it can serve no useful purpose to consider it again." * * *

"The further argument is made that the fourth count did not state a good cause of action. Counsel for plaintiff in error contend that in order to recover under paragraph 'b' of said section 18 of the Mines and Miners' Act it was necessary for defendant in error to allege and prove

that the plaintiff in error had discovered the dangerous conditions complained of. Such is not the law. This court in discussing this section of the statute in *Mertens v. Southern Coal Co.*, *supra*, said (page 544 of 235 Ill., page 744 of 85 N. E.): 'We think the jury were justified in finding from the evidence that the roof of the mine was in a dangerous condition on the morning of the 20th, and that if the mine examiner of the appellant had made a proper examination to ascertain the condition of the roof he would have discovered its dangerous condition, and that from such evidence they were justified in concluding that the mine examiner did not examine the room on that morning, or that, if he did examine it, he discovered its condition and failed to comply with the statute by indicating, by proper marks, its dangerous condition and noting the same in his record and reporting the same to the mine manager.' Manifestly the operators of mines are liable, under this provision of the statute, not only when the dangerous conditions have been discovered by them, but also if, by the exercise of the care required by the provisions of the Act, they could have discovered the existence of such conditions. The argument of plaintiff in error would allow mine operators to relieve themselves from all obligation under these provisions of the Mining Act by simply neglecting, intentionally or otherwise, to make the daily examination provided for therein." * * *

Mule driver injured — Vicious animal — Safe place to work — Master liable.

In *MILLER v. KELLY COAL CO.*, (*Illinois Supreme*, April, 1909) 88 N. E. 196, judgment for plaintiff was *affirmed*, the case being stated in the opinion by FARMER, J., as follows:

"This is an appeal from a judgment of the Appellate Court for the Third District, affirming a judgment for \$3,000 rendered by the Circuit Court of Vermilion county in favor of appellee, and against appellant, for personal injuries sustained by appellee while working as a mule driver in the coal mine of appellant. The declaration contained two counts. The first count charged that plaintiff was employed in defendant's mine, at the time of his injury, as a mule driver, in hauling coal along the sixth northwest entry; that the defendant, disregarding its duty in that behalf, negligently and carelessly furnished plaintiff a mule that was vicious and disposed to kick, which the defendant knew, and which the plaintiff did not know; that on the morning of the second day plaintiff had driven the mule in the usual course of his employment, and while, in the exercise of ordinary care for his own safety, he was hauling coal along the entry about opposite room 30 of said entry, said mule, without provocation, began kicking, and kicked plaintiff down in front of the car; that because of a gob of rock, dirt, and other debris which defendant had permitted to accumulate on either side of the track to a height of, to wit, three feet, plaintiff was unable to escape, and get away from the mule and the car, and was thereby caught beneath the car, loaded with about four tons of coal; that said car was pulled up against, upon, and over plaintiff, thereby crushing the bones of his chest, and injuring him in the hips, arms, head and divers other parts of his body. The second count of the declaration charged the defendant with failing to use reasonable care to provide the plaintiff with a reasonably safe place in which to work.

The second count was taken from the jury by the court, and the cause was submitted upon the first count only." * * *

The principal contention of appellant was that the kicking by the mule was not the proximate cause of the injury, and that the trial court erred in not directing a verdict in its favor upon that ground. The Supreme Court held that the kicking by the mule was the proximate cause, though the gob of rock, etc., was a concurring or intervening cause of the injury. (Citing several cases.)

Mule driver injured by live wire — Mining statute — Dangerous conditions — Master liable.

In *DUNHAM v. BLACK DIAMOND COAL CO.*, (Illinois Supreme, April, 1909) 88 N. E. 216, judgment for plaintiff was affirmed, the case being stated in the opinion by HAND, J., as follows:

"This was an action on the case commenced in the Circuit Court of Sangamon county by Charles H. Dunham, the appellee, against the Black Diamond Coal Company, the appellant, to recover damages sustained by the appellee while engaged as a mule driver in the mine of the appellant, in consequence, as it is alleged, of the wilful violation of the Mines and Mining Act by the appellant. The jury returned a verdict in favor of the appellee for \$365, upon which the court, after overruling motions for a new trial and in arrest of judgment, rendered judgment, which judgment has been affirmed by the Appellate Court for the Third District, and, that court having granted a certificate of importance, a further appeal has been prosecuted to this court." * * *

After setting out the counts of the declaration, the court said:

"The evidence of appellee fairly tended to show that in June, 1907, appellee was at work for appellant in its coal mine as a mule driver, hauling cars in the entry; that over the part of the roadway which he used in his work there ran a trolley wire to convey an electric current to a motor used in the entry of the mine. This trolley wire was only about five or five and a half feet above the bottom of the entry and about twelve inches outside the rail, and was uninsulated and unprotected; that, while there was a current of electricity passing through said wire, the head of the mule that appellee was driving came in contact with a live wire, whereby he received a shock and became unmanageable and pulled the car from the track, and against a post standing near to the track; and that appellee was caught between the car and post and injured. At the close of all the evidence the defendant made a motion for a directed verdict in its favor, and the overruling of that motion is the principal ground for a reversal urged in this court.

"The first contention of the appellant is that the evidence does not show a wilful violation of the provisions of the Mines and Mining Act (Hurd's Rev. St. 1905, c. 93, § 18), in this: that it is said the provisions of said Act are not intended to apply to a dangerous condition in a mine which is the result of faulty conditions in the mine of a permanent nature, caused in the course of construction in opening the mine, but that the dangerous conditions which the statute covers are of a temporary character and such as arise in the operation of the mine, and that, as the live wire which came in contact with the ears and head of the mule which

the appellee was driving at the time he was injured was a part of the permanent construction of the mine, the appellant was not liable for a wilful violation of said statute. We cannot accede to this contention, but think the statute broad enough to protect the appellee from all dangerous conditions found in the mine. The statute provides that no one shall be allowed to enter the mine to work, except under the direction of the mine manager, 'until all conditions have been made safe,' and that, when any dangerous condition is discovered to exist in the mine, the mine examiner shall place a notice to all men to keep out of the mine. Clearly this language of the statute applies to a dangerous condition in the mine such as in the track over which the cars are drawn or in the roadbed or the sides of the entries by which the mine is traversed, as well as dangerous conditions caused by the falling of rock or other debris, and clearly includes a live wire so placed in the mine that a driver or his mule is exposed to contact therewith while in the mine, and from which an injury similar to the injury received by appellee might result. In *Spring Valley Coal Co. v. Greig*, 226 Ill. 511, 80 N. E. 1042, it was held that the statute covered a stationary engine situated at the top of the mine used to furnish power to haul coal cars to the retail dump and to bring back the empty cars by means of a cable.

"It is also urged that the statute under the doctrine of *ejusdem generis*, is limited to the dangers specified in the statute in express terms, and to the same kind of dangers as are expressed in the statute in specific terms, and that the words 'any dangerous condition,' found in the statute, are without significance to extend the scope of the statute. This question was before this court in *Mertens v. Southern Coal & Mining Co.*, 235 Ill. 540, 85 N. E. 743, where it was disposed of adversely to the contention of appellant. We do not think the court erred in declining to take the case from the jury." * * *

Indiana.

Driver injured — Defective switch — Assumption of risk.

In *BRULETTS CREEK COAL CO. v. POMATTO*, (*Indiana Supreme*, May, 1909) 88 N. E. 606, judgment for plaintiff was reversed. From the judgment in the Circuit Court, Clay county, (85 N. E. 993) defendant appealed to the Appellate Court, which transferred the cause, under the provisions of clause 2, § 1394, Burns' Ann. St. 1908, to the Supreme Court. The opinion by MONTGOMERY, CH. J., after discussing the motion to dismiss the appeal, which was overruled, and the error assigned as to overruling demurrer to the complaint, it being held that there was no error, the complaint being good, passed upon the motion for new trial as follows:

"The motion for a new trial charges that the verdict is not sustained by sufficient evidence and is contrary to law, and that errors were committed with respect to the admission and exclusion of certain evidence, and in giving and refusing to give certain instructions. It appears from the evidence that Pomatto was an experienced miner and driver, and that upon application he was set to work in appellant's mine as a driver, on September 25, 1903. Archie Ruatto was sent with Pomatto upon his first trip, to instruct him and to show him the way. The entry through which they went extended east and west, and from this entries led off both north

and south. In the mine were a large number of tracks and switches. Some of the switches are known as 'latch switches,' in common use in coal mines. They are composed of long pieces of iron which can be moved back and forth on fish plates and the ties so as to turn a car on one line of track or the other as desired. A latch switch was placed at a point about 250 yards west of the shaft where a track turns off south leading to the fifth and sixth south entries. The track for some distance east of this point was downgrade going west. When Ruatto and Pomatto came to this switch, they stopped, and Ruatto kicked the switch over to the south so that the car could proceed west on the main track. He then moved it back and had Pomatto to kick it over, and told him that appellant did not have a man at this place and had never had one there, and he would be required to look out for this switch. He was told that at the next switch, where there was a trapdoor, there was a man who would throw the switch on call. They proceeded to south eight and returned with a load of coal to the shaft. Pomatto made the second trip west with two empty cars, threw the latch at fifth south, gave the proper signal to the 'trapper,' and proceeded to eighth south, got his loads, and returned. On the third trip he went west with two cars going pretty fast down the grade, and did not stop, but tried to kick the latch over at fifth south. It did not go over far enough, and the mule went west, and the car jumped the track and crushed Pomatto between the car and the rib of coal. He had a driver's lamp with him, which lighted the way several feet in front of him, and when he came within a few feet of the switch he saw small pieces of dirt or coal about as large as chestnuts in the switch. He knew that the switch might become clogged by coal falling from the roof, and by dirt or coal thrown by the feet of mules. In the absence of a man to tend the switch, it was the duty of the drivers to look out for switches and to see that they could be moved before going upon them. The latch switch was in good repair, except for the presence of dirt and a few small particles of coal, and had been in use by a number of drivers during the morning, and operated and passed in safety within five minutes before this accident. It appeared further that appellant caused the switch to be inspected and cleaned every morning, and that it was so inspected and cleaned on the morning of this accident. There was some conflicting evidence upon the subject of a local custom in and about Clinton under which a man was kept in charge of such switches.

"If it be conceded that evidence of such a custom was admissible under the issues, the result must be the same. Pomatto admitted that he was told and knew there was no one in charge of this switch, and that the driver must operate it himself, and therefore assumed the task as a part of his duties. The switch was not out of repair or unsafe for ordinary use. Others besides the decedent had used it with safety immediately prior to the accident. The obstructions to its free use were slight and only such as Pomatto and other experienced drivers knew might be met with at any time and were required to look for and remove if necessary in passing. No one had any better opportunity than Pomatto to discover the obstructions, and he says he did discover them, but he had not prepared to stop, and was traveling at a lively speed, and could not

stop after seeing the danger before derailing the car. The complaint proceeds upon the theory that appellant exposed its servant to a danger of which he was ignorant and of which it had knowledge, without taking any precautions for his safety. The evidence of the decedent himself shows that he was an experienced and competent mine driver, and was fairly instructed with respect to his duties and working place, and knew the dangers incident to such employment, and the particular perils connected with the switch which caused the accident. It follows that the complaint is not sustained, and, if appellant was chargeable with negligence, the decedent assumed the risk or was guilty of contributory negligence, and cannot recover upon the undisputed facts. *Chicago, I. & L. R. Co. v. Cobler* (Ind.) 87 N. E. 981; *Pere Marquette R. Co. v. Strange* (Ind.) 84 N. E. 819; *Indianapolis Water Co. v. Harold*, 170 Ind. 170, 83 N. E. 993; *National Biscuit Co. v. Wilson*, 169 Ind. 442, 82 N. E. 916; *Mitchell L. Co. v. Nickless* (Ind. App.) 85 N. E. 728; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 14 Am Neg. Cas. 447, 38 N. E. 52."

Cave-in of roof of mine — Statutory requirements — Master liable.

In *COLLINS COAL CO. v. DE PUGH*, (*Indiana Appeals*, May, 1909) 88 N. E. 317, judgment for plaintiff for \$4,500 in the Circuit Court, Putnam county, was *affirmed*. The action was for injuries sustained by plaintiff while in defendant's employ as a coal miner, alleged to have occurred by negligence of defendant in failing to comply with certain provisions of the Mining Act, 1905 (Acts 1905, p. 74, c. 50, § 15) requiring mine bosses to make examination and see that every working place in the mine is properly secured by timbering, etc., and that operators of mines shall place a blackboard near the main entrance stating the lengths of timbers in use and upon which miners shall register requisitions for timber. The court (per COMSTOCK, P. J.) said:

"The complaint discloses, and there is evidence to establish, the facts of this case to be that appellant failed to deliver props to plaintiff's working place, although it was requested so to do on Saturday before the accident, and on Monday, the day of the accident; that appellant on both of said days posted his requisition for props on the blackboard furnished by the company, and gave orders for props to the driver; that during all the period that plaintiff worked in the stub entry the bank boss visited his working place only once, and at no time made an inspection of the roof; that, if plaintiff had been provided with props, he could have and would have secured his working place from caving in, and the props could have been used without interfering with his work; that the roof at the point where the fall took place appeared to plaintiff to be reasonably safe; that he sounded it with his pick, and could discover no signs of immediate or imminent danger; that he wanted the props to render his place absolutely safe, and could have made it so had appellant timely furnished props; that, by reason of the failure of appellant to furnish props and examine appellee's working place through its bank boss at least every alternate day, appellee received great and permanent injury."

Dangerous workplace in mine — Blasting — Master liable.

In *HYMERA COAL MINING CO. v. MAHAN*, (*Indiana Appeals*, April, 1909) 88 N. E. 108, judgment for plaintiff for \$2,000 in the Circuit Court, Sullivan county, was *affirmed*. The action was to recover damages for personal in-

juries alleged to have been sustained by appellee while in the service of appellant in a coal mine, charging appellant with negligence in failing to provide a safe working place, by negligently permitting the pillars, left standing for the support of the mine and the safety of the men, to become so thin and weak as to permit a shot, fired in an adjacent entry, to blow through and injure appellee. Opinion by ROBY, J. It was *held* that "where the negligence of a fellow-servant contributes to an injury, it will not preclude a recovery, where the negligence of the master combines to produce such injury." The court said: "Had appellee known the thickness of the pillar, and there is no reason shown why he did not know it, such fact would not bar recovery, for the reason that knowledge of the depth of the charge placed on the opposite, and of the fact that it was about to be exploded, were essential to an understanding or assumption of the risk by reason of which he was injured. The explosion would have hurt no one had the proper barrier of coal been left behind it. The servant assumes such risks as are incident to the work in which he is engaged, but not those occasioned by the negligence of the master."

A dissenting opinion was delivered by RABB, J.

Iowa.

Miner killed while using cage — Contributory negligence.

In *CONTRI v. HOLLINGSWORTH COAL CO.*, (Iowa, June, 1908) 121 N. W. 506, coal miner killed while attempting to use the cage resting at the bottom of the shaft when the cager was absent, judgment for plaintiff in the District Court, Polk county, was *reversed* on the ground of contributory negligence. The court (per SHERWIN, J.) after setting out the facts, said:

"The deceased was an experienced miner and had been at work in the defendant's mine for several months prior to the accident. He knew the location and purpose of the runway, and had used it more or less in passing to his work north of the shaft. He knew the way in which the cages were operated and the signals that were used in their movement. He knew that it was at all times dangerous to attempt to cross a cage, and especially so when the cager was not at his post of duty, for he had repeatedly been warned of the danger in so doing, and had been directed not to cross them. That he fully understood such warnings and directions is clearly shown by the record. He knew that the cager was not required to be on duty before 7:30 A. M., and that, when the men working in the mine went down the shaft before that time, the operation of the cages was controlled by some one of the men so descending, and that it was done by signaling from the bottom of the shaft; the signal consisting of a bell at the top thereof, which was rung by means of a wire extending to the bottom. The deceased was killed before 7:30, and when he attempted to step onto the cage he knew that the cager was not yet there, and that the movement of the cages would be directed by some of his fellow workmen until the arrival of the cager. One of his fellow workmen had, in fact, signaled for the hoisting of the cage upon which he attempted to step only two or three minutes before the accident; but whether Contri heard the signal or not may be a doubtful question under the evidence. There is evidence tending to show that it was frequently necessary to take up one or two of the planks in the manway walk immediately over the trench and pipe, for the purpose of opening holes in

the pipe for the admission of water, and that the plank so removed often remained out of place for some time, all of which was known to the deceased and to all others who were called upon to use the manway. It is also shown that two of such planks, each ten inches wide, were out on the morning in question. The record shows that, when the steam pump, located at the sump, was in view, the steam escaping therefrom somewhat obscured the view along the manway; but it is conclusively shown that at other times there is no difficulty in seeing the way, and hence no danger in passing over the walk, even if the planks belonging over the trench are out of place. The evidence also conclusively shows that the pump had not been operated that morning, and that it was not in operation at the time of the accident. It is true that one of the plaintiff's witnesses testified that, when he started along the manway that morning just before the deceased did, the dripping water or steam put his headlight out; but he did not testify that the pump was then or had been at work that morning, or that with the use of a light he could not have safely used the manway. There was never any natural light at the bottom of the shaft, and every man whose work or duty called him there had to provide his own light. The deceased had a light when he started through the manway and when he returned and stepped onto the cage. The planks were up the night before, but whether the deceased knew of such condition is not shown. However, if he did, he knew that the hole could be safely crossed, and, if he did not, there was no excuse for attempting to cross the cage. From whichever way the action of the deceased be viewed, he was clearly guilty of contributory negligence, and he as clearly assumed the risk of his unauthorized conduct. *Lindquist v. Plaster Co.* (Iowa) 117 N. W. 46, and cases cited therein; *Muldowney v. Ill. Cent. Ry. Co.*, 39 Iowa, 615, 14 Am. Neg. Cas. 612, 618; *Nelling v. C. St. P. & K. C. Ry.*, 98 Iowa, 554, 63 N. W. 568, 14 Am. Neg. Cas. 679, 67 N. W. 404; *Forbes v. Railway Co.*, 113 Iowa, 94, 84 N. W. 970; *Kelsey v. Railway Co.*, 106 Iowa, 253, 76 N. W. 670; *Rush v. Coal Bluff Mining Co.*, 131 Ind. 135, 14 Am. Neg. Cas. 476, 30 N. E. 904; *McDonald v. Coal Co.*, 135 Pa. St. 1, 19 Atl. 797; *Crowe v. N. Y. Cent. Ry.*, 70 Hun (N. Y.) 37, 23 N. Y. Supp. 1100." * * *

Miner Killed by falling slate — Contributory negligence.

In *LAMMEY v. CENTER COAL MINING CO.*, (Iowa, November, 1909) 123 N. W. 356, employee killed by fall of slate in defendant's mine, verdict directed for defendant in the District Court, Polk county, was *affirmed*. The court (per DEEMER, J.) reviewed the case at length from which it appeared that deceased and his son were working together in one of the rooms in the mine, drilling coal, and that the son had used the props furnished to secure the roof, and told his father that he had propped it up safe. Shortly afterwards the roof fell upon the father. Defendant had nothing to do with the room, save to deliver the props, the father and son having complete charge of it, the son really having the charge, the father simply helping in the loading and drilling. The court said: "From the entire record we are constrained to hold that the trouble was not due to defendant's failure to send down props of sufficient length, but to the failure of the son to use the necessary number of props. He undertook to procure these, and said that he made the roof as

safe as he could. If he did not get and use a sufficient number, it was his own fault, and defendant is not to be held responsible for the danger resulting therefrom." The court also said: "We think it clear that the father was guilty of contributory negligence in working under this slate which was, to his knowledge, likely to fall at any moment."

Fall of slate from roof in mine — Master liable.

In *COTTON v. CENTER COAL MINING Co.*, (Iowa, November, 1909) 123 N. W. 381, employee injured by fall of slate from the roof of an entry in defendant's mine, judgment for plaintiff in the District Court, Polk county, was *affirmed*. It appeared that the employee had complained to the pit boss that the roof was loose and likely to fall and the pit boss promised to timber it. The court reviewed the facts and evidence, and the errors complained of, and held that the case was properly for the jury and affirmed the judgment for plaintiff. Opinion by DEEMER, J.

Kentucky.

Defective brake on car — Inspection — Accident.

In *WILLIAMS COAL CO. v. JONES*, (Kentucky, April, 1909) 118 S. W. 342, judgment for plaintiff in the Circuit Court, Ohio county, was *reversed*, the opinion by HOBSON, J., stating the case as follows:

"The Williams Coal Company loads coal on cars furnished by the Illinois Central Railroad Company. It was Frank Jones' duty to run the empty cars down to the tippie. Ordinarily, when they were loaded at the tippie, it was the duty of one Jackson to run them down from the tippie. The track was constructed upon an incline, so that the cars would move by their own weight when started, and could be checked by the person on them when they reached the proper place. About July 7, 1908, Jackson went away with the superintendent of the mines, fishing, and the boss ordered Jones to ride the cars both ways; that is, to ride the empties down to the tippie and to ride the loaded cars out from the tippie, telling him that he would furnish a man named Baker to help, but Baker could not handle the cars by himself. While Jones was taking an empty down to the tippie that day, a brake shoe dropped down, and was wedged in between the tracks. A man who was standing not far off saw the car stop, and, seeing nothing of Jones, went over to it. He found him lying in the bottom of the car insensible. His jawbone was broken and his teeth were knocked loose. His brake stick was in the brake wheel, and the proof was to the effect that, when the shoe dropped down, the brake would unwind, causing the wheel to revolve, and that, as the wheel revolved, it would bring the stick in contact with Jones' head, if he was standing on the car as indicated by the position of his feet at the time he was found; that is, the hanging of the shoe would cause the brake wheel to turn rapidly in the other direction from that in which Jones' was turning it, and would cause the brake stick to strike him. Jones testified that the last thing he remembered he was on the hill or top of the incline, that he got down and fixed the chain and got back on the car, and that is the last he could recollect until the next morning. He brought this suit to recover for his injuries on the ground that he was doing at the time the work of two men; that it was necessary to have another man to assist

him; that he was required by the bank boss to do the work by himself; that he informed the boss that the work could not be done properly by one man, but the boss answered that one man was sufficient to do it, and he, relying on this assurance attempted to proceed with it, and, while so engaged, received the injuries complained of by reason of the fact that he had not proper assistance.

"There is no proof at all that he informed the boss that the work could not properly be done by one man, or that the boss assured him that one man was sufficient to do the work, or that he received any assurance from the boss as to his safety in doing the work. The fact is the proof shows conclusively that, when Jackson was there, he simply rode the loaded cars out from the tipple to the lower end of the side track. Jones brought in the empties from the upper end of the side track to the tipple by himself. He had been working there two years, and this was the usual course of business. The absence of Jackson, Jones testifies, made it necessary for him to take out the loaded cars from the tipple, and this gave him less time to attend to his usual duties of bringing in the empties from the upper end of the track. He says he had to be in a hurry all day to keep the cars at the tipple so that the coal could be loaded upon them. It is insisted for him that, owing to the fact that he had to take out the loaded cars that day, he had less time to inspect the empties and to bring them down to the tipple than he otherwise would have had, and but for this he would not have been injured. The proof is conclusive that the inspection of the cars was to be performed by Jones. He was paid forty cents extra to inspect empty cars. No other servant was required to make an inspection of the empties except him. He testifies that he always inspected the cars, that he cannot say whether he inspected this particular car or not, but he supposes he inspected it, as he made it a rule to inspect the cars. He does not show that he did not inspect the car, or that he failed to inspect it because he had not time to do so. He does not show that the boss told him not to inspect the cars, or relieved him of his duty. There is nothing in the proof to show that he was prevented from making an inspection by reason of the absence of Jackson, and it is not shown that by any inspection which he could have made the dropping down of the brake shoe could have been averted. In other words, the whole cause of the accident is unexplained, and it would seem from the proof to have been merely one of the accidents incidental to the movement of railroad cars. The rule is that the plaintiff must show negligence on the part of the defendant, and that this negligence caused his injury. If the facts shown legitimately establish a no stronger presumption of negligence on the part of the defendant causing the injury than of an accident for which the defendant would not be responsible, a peremptory instruction should be given. Under this rule, we conclude that the Circuit Court should have instructed the jury peremptorily to find for the defendant. While the plaintiff does testify that he had to be in a hurry all that day because he had to run both ends, as Jackson was away, he does not testify that he was so hurried as to prevent him from inspecting the car before starting down the hill with it. He does not testify that he was acting at the time under any emergency requiring him

to dispense with the inspection of the cars by reason of the double duty the defendant had imposed on him. The evidence leaves the mind in equal doubt as to whether the plaintiff inspected or did not inspect the car, or as to whether the falling down of the brake was or was not simply an accident incidental to the business." * * *

*Employee of independent contractor injured by falling slate from roof—
Mine owner liable.*

In *CUMBERLAND COAL CO. v. LEE*, (Kentucky, June, 1909) 119 S. W. 746, judgment for plaintiff for \$2,000 in the Circuit Court, Knox county, was affirmed. Plaintiff was an employee of independent contractors, who had contracted with defendant to drive an entry in its mine, and while so working plaintiff was struck by slate falling from the roof of the entry. Defendant contracted to keep the entries in a reasonably safe condition for persons working there, and, for its neglect in so doing, was liable to plaintiff. Opinion by NUNN, J.

Maryland.

*Bursting of air pipe in mine—Knowledge of danger—Assumption of risk—
Fellow-servant.*

In *HARRIS v. CONSOLIDATION COAL CO.*, (Maryland Appeals, June, 1909) 73 Atl. 805, judgment for defendant in the Circuit Court, Allegany county, was affirmed. Plaintiff was injured while working in defendant's coal mine. The facts are stated in the opinion by BURKE, J., as follows:

"The rooms of this mine, in which the men worked, were connected with the mouth of the mine by an underground heading or gallery several miles long, through which the workmen of the defendant were accustomed to walk in going to and from their work. The defendant had installed an engine and certain machinery at the mouth of the mine, and compressed air engines within the heading or gallery mentioned, and had laid and maintained a two and one-half inch steel air line pipe of the thickness of about five-sixteenths of an inch along the side of this heading. This pipe was laid close to the ground, and in wet seasons was largely covered by sulphur water, which found its way into the gallery. From the machinery and engine at the mouth of the mine compressed air of great pressure was pumped through this pipe to a point within the mine at which it was transferred to compressed air engines, which were used to haul coal over a motor road in the heading from the rooms of the mine to the bottom of the slope of the mine. The pressure of this pipe was about 900 pounds to the square inch.

"On the morning of the accident, while the appellant was passing through this heading to the room in the mine in which he was employed by the defendant to dig coal, the pipe suddenly burst and injured him. At the point where it burst the pipe was covered with sulphur water. The declaration alleges that the pipe was negligently laid along the side of the heading so close to the ground, and largely under water which drips from the side of the gallery, and that the pipe which carried the compressed air through the heading was not of sufficient strength to bear the high pressure of the compressed air which was forced in and through it from the machinery and engine at the mouth of the mine;

that the only entrance for the employees, or miners, was in and through the heading, and along and near the pipe line, and that because of the high and dangerous pressure of the compressed air transported through the heading and the insufficiency of the pipe to support or sustain this high pressure through the same, which was negligently laid, and allowed to be or to become covered with sulphur water, and thereby weakened, it was dangerous and unsafe for the miners and employees of the defendant to pass through the gallery into the rooms of the mine. It is also alleged that the place was dangerous because of the neglect of the defendant to provide any other safe or available means of entrance to the rooms of the mine. The precise neglect which caused the injury is stated as follows: 'That the high pressure of compressed air in said pipe caused the bursting of said pipe, and that the explosion therefrom was the cause of the said injuries to the plaintiff, while he was passing to his work, in the line of his duty, in the exercise of due care and caution on his part, in said dangerous and unsafe place of said gallery, and that in consequence of such dangerous and unsafe condition of said place he was knocked down and injured by the bursting of said pipe, and that the defendant knew that said place was dangerous and unsafe, or by the exercise of ordinary care and prudence could have known that it was dangerous and unsafe, and in time to remedy and prevent said accident, and that the plaintiff was ignorant of the unsafe and dangerous condition of said heading or gallery of said place, and could not by the use of ordinary care and prudence on his part have known the same.'

The court passed upon the competency of expert and opinion evidence, and continued: "If it be conceded that the failure of the defendant to provide a safe and available manway was negligence, it must likewise be admitted that that negligence was not the cause of the injury sued for. Besides, the condition of the manway and the heading was well known to the plaintiff. If their condition were a source of danger to persons working in the mines, it was a danger which was open and obvious, and he must be held to have assumed all risks incident thereto."

"It was also held that an inspector of air pipe line in a coal mine is a fellow-servant of a miner employed to dig coal in said mine, and the miner cannot recover from the master for injuries incurred by the negligence of such inspector.

Michigan.

Miner injured in cage — Failure to comply with statutory requirements — Mine owner liable.

In *KLEINFELT v. J. H. SOMERS COAL CO.*, (*Michigan*, April, 1909) 121 N. W. 118, verdict directed for defendant in the Circuit Court, Saginaw county, in action for death of miner, was *reversed*, the facts being set out in the opinion by MONTGOMERY, J., as follows:

"The defendant's mine was about 195 feet deep, and miners and others customarily entered and departed from the mine by means of cages operated in the main hoisting shaft. These cages were raised and lowered by means of cables attached to drums operated by the hoisting engine at the surface, and so arranged that while one cage was ascending the other was descending. The cages used for hoisting coal were the

same cages upon which the men were carried. The cage upon which the accident occurred was six or seven feet long and about four feet wide. It was open at the two ends, but on the sides a piece of sheet iron extended upwards about three feet from the floor. Upon the floor there were laid two tracks lengthwise of the cage, upon which the cars of coal were run. In the middle portion of these tracks, the sections of the floor upon which they were fastened were so constructed that, as the cage started upward from the bottom of the shaft, these sections, each six inches wide by two feet long, would drop down from six inches to a foot, for the purpose of allowing the car wheels to settle down, and thus hold the car securely in place. These sections dropped down as described when no car was being hoisted. Overhead a trip bar extended across the cage from side to side, so placed that it was about eighteen inches from one end. This bar was about one and one-half or two inches in diameter, and was placed upon the cage for the purpose of dumping it. Where this trip rod was there was also two rollers which held that part of the cage level. The height of the cage was about seven feet. Running from the ends of the trip rod downwards were braces placed outside of the sheet-iron sides. At the top of the cage, hinged near the middle, were two covers or lids of sheet iron, the purpose of which was to prevent falling objects from striking persons in the cage. The inside of the shaft was lined from top to bottom with squared timbers or buntings, so laid that there was alternately a timber, then a space, and so on. The cage ran up on guides inside these timbers, and with a very narrow space between the floor of the cage and the inside faces of these timbers.

"On the date in question the plaintiff's intestate, who was a miner in defendant's employ, was down in this mine breaking down coal for removal the following day. He was accompanied by his son, Gus Kleinfelt, a boy between twelve and thirteen years of age. About dinner time Kleinfelt and his son and an Italian miner started to walk out towards the shaft to go to the surface. On their way they met the superintendent of the mines, John T. Phillips, and the foreman of this mine, No. 3, Hugh McKenna, Sr., and another man named Alexander, who were working at a pumping engine. Mr. Kleinfelt spoke a few words with Mr. McKenna, and the latter directed him to hurry up and get on the cage. Mr. Kleinfelt, his son, and the Italian immediately went to the cage, got on, and the cage started to go as soon as they got on. Upon this cage when it started to ascend was Clarence Curtis, who was the regular engineer, having in charge the hoisting engine at the surface, but who was then doing work in connection with fitting up the pumping engine, also Sidney Traver, helper to the master mechanic, and Kleinfelt, his son, and the Italian. There was also placed upon the cage by Curtis and Traver a piece of iron pipe one and one fourth inches in diameter and fourteen feet long, which they had brought from the pumping engine where they had been working under Phillips and McKenna, and which they were taking to the surface to have recut. Curtis had raised one of the sides of the lid or hood and stood it up against the cable. He then passed the pipe up through the top of the cage alongside of the lid, with the lower end resting on the floor of the cage. The lid was not fastened in any way, but merely stood up in a vertical position against the cable. He then,

during the ascent, held the pipe with his hand. Mr. McKenna knew that the pipe was about to be taken in this manner. Gus Kleinfelt, who was at the side of his father during all of this time, testifies that he did not see the pipe until after he was on the cage. The cage ascended with great rapidity, so that the lights on the caps of those in the cage were all extinguished immediately after starting, leaving the cage in total darkness. It appears that the hoisting engine was at this time in charge of one George Tigner, who was not employed as an engineer, but as a fireman. There was some testimony that his reputation was bad as to speed in handling the cage. When the cage had reached a point about forty feet from the surface, there was a great rattling and shaking of the cage and an outcry by the men, and the cage came to a stop in about fifteen feet. All of those on the cage, with one exception, were thrown down flat on the bottom of the cage. They got up when the cage stopped and climbed to the surface, up the buntings or timbers. They found the lid or cover which Curtis had stood up against the cable fallen over in its usual horizontal position and had to push it up again in order to crawl out. When a light was taken into the cage, it was found that the end of the pipe was stuck into a timber at the side of the shaft, and the pipe was curved around inside of the cage. The two ends of the pipe were eighteen inches or two feet apart; the platform of the cage being past the timber in which the top of the pipe was caught about fifteen inches. Mr. Kleinfelt's body was found between the timbers; the bottom of the cage having come up past his head and shoulders, and he being crushed to death. Life was extinct before he was found. There were no bars or rings placed on this cage to furnish handholds for passengers thereon.

"The plaintiff charges the defendant with negligence: In failing to have this cage in the mine fitted with iron bars or rings in proper place, as required by section 15, Act No. 100, p. 144, of the Public Acts of 1905; in permitting a fireman to operate the cage and hoisting device, contrary to the provisions of section 3 of the same Act; in directing the deceased to go upon the cage at the same time that a pipe fourteen feet long and one and one-quarter inches in diameter was to be carried; in allowing said pipe to be carried on the cage together with deceased and other passengers; and in not providing a proper catch or safety device for holding the lid at the top of the cage in a vertical position.

"The statute (Act No. 100, p. 143, Pub. Acts 1905) provides, in section 3: 'That only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all coal mines (any coal mine) of this State.' By section 15 it is provided: 'Every cage on which persons are carried must be fitted up with iron bars or rings in proper place, and a sufficient number to furnish a secure handhold for each person permitted to ride thereon.' That the testimony offered on the part of the plaintiff tended to show a neglect by the defendant of each of the duties defined by these two sections is beyond controversy. It is also settled in this State that, where a statute imposes a duty upon the employer for the protection of the employee, injury from the neglect of this duty is not one of the risks assumed by the employee." * * *

Continuing, the court said: "The rule is that, where an injury results from the fault of a fellow-servant, concurring with that of the master,

both may be liable. *McDonald v. Railway Co.*, 108 Mich. 7, 65 N. W. 597; *Hayes v. Stearns Co.*, 130 Mich. 287, 89 N. W. 947; *Lockwood v. Tennant*, 137 Mich. 305, 16 Am. Neg. Rep. 413, 100 N. W. 562. To say that the proximate cause of the injury, in the absence of handholds, is something other or different from that of neglect of duty, would be practically to render this statute of little value to employees. The occasion for the handhold arises only when an accident occurs, either unforeseen or through the fault possibly of a fellow-servant. It is in this emergency that the handhold is of some value to the employee, and undoubtedly it was with the view of meeting this emergency that the legislation was enacted. It would not meet the purpose of the legislation if the courts should say that it would be impossible to offer direct proof that had the handholds been provided the injury would not have happened, and that therefore no recovery could be had."

Missouri.

Blasting — Falling stone from roof — Miner injured — Master liable.

In *ROWDEN v. SCHOENHERR-WALTON MINING CO.*, (*Missouri Appeals, Kansas City*, March, 1909) 117 S. W. 695, judgment for plaintiff in the Circuit Court, Jasper county, for \$1,000, was *affirmed*, the facts being stated in the opinion by JOHNSON, J., as follows:

"The principal contention of defendant is that the court erred in not peremptorily instructing the jury to return a verdict for defendant. At the time of the injury, February, 1908, defendant was engaged in the operation of a lead and zinc mine in Jasper county and employed plaintiff to drill holes for blasting. A machine was used for this purpose, and plaintiff was assisted in his work by a helper. Plaintiff's duties required him to drill and load the holes and fire the shots. It was customary to work during the day drilling and loading and to explode the charges the last thing in the evening. The workmen left the mine before the explosion occurred and did not return to work until the next morning. This method had been pursued by plaintiff and his helper the day before the injury. They drilled, loaded, and fired a number of shots in the drift where the had been directed by the defendant. The roof of this drift was about seven or eight feet above the floor, and the nature of the material was such that the explosions were likely to crack and shatter the roof in a way to make it dangerous for miners to work under it until it had been inspected and trimmed. To trim it properly, it was necessary for a miner to detach with pick or spoon the stones, boulders, and slabs that had been loosened by the shots and were likely to fall. When plaintiff and his helper went to work on the morning of the injury, the roof had not been trimmed. In a moment or two after they entered the drift, plaintiff left for some reason, not important, and the helper, observing some loose stones in the roof, began detaching them with a pick. Plaintiff returned to the drift while this was being done, and immediately after his return a large slab, twelve or fifteen feet long, ten or twelve feet wide, and from two to eight inches thick, fell from the roof. Plaintiff was under one edge of it, and was struck and injured." * * *

Defective hoisting appliance — Master liable.

In *PHELPS v. CONQUEROR ZINC & LEAD CO.*, (*Missouri Supreme, Division No. 1*, February, 1909) 117 S. W. 705, judgment for plaintiff for \$7,500 in the Circuit Court, Jasper county, was *affirmed*, the material parts of the petition being as follows:

"That the rock and earth from said mine was raised in tubs and lowered back into the mine, through said shaft, by means of a cable drawn over an iron pulley by a hoisting apparatus which was propelled by steam power applied and controlled by levers and brakes, manipulated by hand. That it was the duty of the plaintiff, as hoisterman, to manipulate said levers and brakes, thus hoisting and lowering said tubs. That the iron pulley, before mentioned, was fixed in a derrick directly over the centre of said shaft and overhead the plaintiff when at his post as hoisterman, and revolved with an iron or steel axle or shaft to which it was fastened. But plaintiff states that the defendant negligently furnished him with an unsafe appliance with which to do hoisting, in this: that the iron or steel axle or shaft to which said pulley was fastened, and with which it revolved overhead the plaintiff, was dangerous and unsafe for said work, in this: that said axle or shaft was weak and defective, and, among other defects, contained a hole or flaw which rendered it liable to break and fall from its place, thus endangering the life of the plaintiff. And said hole, if it was a hole and not a flaw, was so cut and placed in shaft or axle as to render said axle or shaft, on account of its small size compared with the size of said hole, weak and defective, and not reasonably safe for the purpose for which it was used. That defendant, its agents and officers, knew of said hole or flaw in said axle or shaft, and of its weak and defective condition on account thereof, or by the exercise of reasonable care might have known the same, in time to have same replaced before the happening of the accident hereinafter mentioned. That on the 24th day of September, 1904, the plaintiff, while in the performance of his duty as hoisterman for defendant, and while in the exercise of ordinary care, was lowering a tub by means of the hoisting apparatus aforesaid, when the said iron or steel axle of shaft, by reason of its defective condition and of the hole or flaw in the same, broke and fell with the pulley, striking the plaintiff on the head, breaking and crushing his skull so that much brain matter escaped from plaintiff's head, by reason of which the plaintiff has suffered much bodily pain and mental anguish, and has been confined for seven weeks to his room, and has since said injury been unable to perform any labor; and that his head, by reason of said injury, has been permanently injured, so that he suffers pain in his head and his eyesight is impaired and his head scarred and disfigured, by reason of which he has been damaged in the sum of \$19,500, and that on account of said injuries the plaintiff has been compelled to become liable to pay, and has paid, to physicians and surgeons for professional attention to him, and for nursing and drugs and medicines, the sum of \$500."

Judgment of affirmance by WOODSON, J. *Rehearing denied*, March 31, 1909.

Falling rock from roof mine — Statute — Inspection — "Generating gas" — Defective pleading.

In *TIMSON v. MANUFACTURERS' COAL & COKE CO.*, (*Missouri Supreme*, May, 1909) 119 S. W. 565, judgment for plaintiff for \$7,000 in the Circuit Court, Clark county, was *reversed*, in action for death of plaintiff's husband while working in defendant's mine, caused by a rock falling from roof of mine. The action was brought under Rev. St. 1899, §§ 8802, 8820 (Ann. St. 1906, pp. 4084, 4096) and Rev. St. 1899, §§ 2865, 2866, (Ann. St. 1906, pp. 1644, 1646), recovery being had under the former sections. The court construed the statute, especially section 8802, requiring inspection of mines "generating gas," and held that the petition was defective in not charging that defendant's mine generated gas, and plaintiff failed to make a case without such proof. VALLIANT, CH. J., dissented, and WOODSON and LAMM, JJ., dissented in part. Dissenting opinion filed by VALLIANT, CH. J. GRANT, BURGESS and FOX, JJ., concurred with the opinion of GRAVES, J., in reversing the judgment, and WOODSON, J., concurred in all except as to the defense of duress.

Boy injured by falling object from roof of mine — Master liable.

In *ANDERSON v. WESTERN COAL & MINING CO.*, (*Missouri Appeals, Kansas City*, May, 1909) 119 S. W. 986, judgment for plaintiff in the Circuit Court, La Fayette county, in action for injuries to his son while working in defendant's mine, was *affirmed*. The facts are stated in the opinion by JOHNSON, J., as follows:

"At the time of the injury, the boy, Ernest Anderson, was employed as a shoveler in a coal mine operated by defendant. The cause of action alleged in the petition is negligence of the defendant in failing to exercise reasonable care to furnish its servants a reasonably safe place in which to work. The defenses pleaded in the answer are a general denial and pleas of contributory negligence and assumed risk. Ernest was fourteen years old, and was employed as one of a crew to operate an electric mining machine. He had not worked before in a mine where machinery of that kind was used, but had worked at coal mining for some time. The machine weighed about 2,700 pounds, and was used in cutting out coal. The crew consisted of a foreman and three men. It was the duty of Ernest to shovel coal cut by the machine. The evidence of plaintiff shows that it was the duty of the foreman to inspect the roof, and to keep it in a reasonably safe condition for the operation of the machine under it. During the forenoon of the day of the injury, all of the men except Ernest had tested the roof which was of slate, and found it somewhat loose. One of them called the foreman's attention to its condition, whereupon the foreman tested it. The men worked until noon, and, when they resumed work after lunch, the foreman again tested the roof, and told the men 'it would not hold up, that he thought we could get through.' He did not stop to knock down or prop the loosened material. The men went on with their work and in about fifteen minutes an extensive, but thin, slab of slate fell from the roof at the place where the tests had been made, and Ernest was injured. The manner of making the tests was to sound the roof with pick or hammer. If it sounded hard, it was considered to be in a safe condition, but a hollow sound would indicate that material tested was loose, and might fall. Though the tests

made by the men disclosed a loosened condition, they thought there was no immediate danger. Ernest testified that he made no tests, but relied on the judgment of the foreman. Further, it appears that the running of the machine produced vibrations which had a tendency to hasten the fall of such loosened material." * * *

The court held that reasonable care was not shown on part of defendant, and that the injured employee did not assume the risks nor was he guilty of contributory negligence.

Montana.

Miner killed by falling from cage — Doors — Statute — Evidence insufficient.

In *MONSON v. LA FRANCE COPPER CO. ET AL.*, (*Montana*, April, 1909) 101 Pac. 243, judgment for plaintiff for \$4,000 in the District Court, Silver Bow county, was *reversed*, in action for death of plaintiff's husband, a pumpman in defendant's employ, who was killed by falling from one of the cages in defendant's mine. The evidence was held insufficient to show that defendant's failure to keep the doors of the cage in place as required by statute, Rev. Codes, § 8536 (Laws 1903, p. 125) was the proximate cause of the death of plaintiff's husband. Opinion by BRANTLY, CH. J.

Pennsylvania.

Gas explosion — Miner injured — Assumption of risk.

In *BISKO v. BRAZNELL GAS COAL CO.*, (*Pennsylvania*, January, 1909) 72 Atl. 504, miner injured by gas explosion in mine, judgment for plaintiff in the Court of Common Pleas, Allegheny county, was *reversed*. It was held that plaintiff having knowledge of an accumulation of gas in an entry to which he goes under orders of foreman assumed the risk. The court referring to the Act of May 15, 1893, article 7, providing that the superintendent of a mine, on behalf of the operator, shall at all times keep on hand in the mine a full supply of all materials and supplies to preserve the health and safety of the employees as ordered by the mine foreman, said that unless it is made to appear that the mine foreman, at the instance of the workman, has made a requisition for materials on the owner or superintendent of the mine, and it has been refused, or it appears that the owner or superintendent has failed to keep on hand at the mines the necessary materials or supplies, there can be no basis for a charge of negligence in failing to furnish supplies which will support an action against the owner of the mines. Opinion by MESTREZAT, J.

Miner running car coming in contact with roof of mine — Master liable.

In *BURNS v. VESTA COAL CO.*, (*Pennsylvania*, March, 1909) 72 Atl. 800, judgment for plaintiff for \$7,500 in the Court of Common Pleas, Washington county, was *affirmed*, the facts being stated in the opinion by POTTER, J., as follows:

"In this action the plaintiff sought to recover damages for personal injuries, resulting, as alleged, from the negligence of the defendant. It appears from the evidence that, in the operation of its coal mines by the defendant, the coal is loaded in cars which are assembled in trains in the mine by electric motors, and these trains are then hauled out by other larger and more powerful motors. The gathering motors were equipped

with a seat in the rear for the motorman, which seat was low enough to require a portion only of the body of the motorman to extend above the platform of the motor. A similar seat on the front end was provided for the use of an assistant to the motorman, who was called the 'snapper,' and whose duty it was to throw switches, make couplings, and keep a general lookout ahead on the track, and in various ways assist the motorman. The 'snapper' usually rode on the front end of the motor. When the plaintiff applied to the defendant company for employment, he stated, in answer to a question, that he had never worked with a motor, but he had been a mule driver in a coal mine, and had discharged duties in gathering and handling cars somewhat similar to those of a 'snapper.' He was then given employment as a 'snapper,' and went to work on a five and a half ton motor. After working two days, he and the motorman with whom he was working were assigned to an eight-ton motor, constructed differently, and with a higher platform or top, and without a seat for the 'snapper' such as had been provided on the motor upon which he was first engaged. The evidence tends to show that no instructions were given to plaintiff as to where he should ride upon the larger motor, and that no warning was given him against the danger from low places in the roof of the mine, which would not permit of passage while sitting upon the top of the motor; nor does it appear that he had any knowledge of the existence of such low places, which were liable to catch and injure him. Prior to the accident the plaintiff sat upon the top of the front end of the motor, and while in this position, as it was moving to the place in the mine where work was to begin, and while he was attending to his duties, looking ahead for switches and obstructions on the track, a low place in the roof was encountered which would not permit of passage without crowding plaintiff from the motor, and in consequence he fell on the outside of the track, with one leg over the rail, and was run over, and so injured that amputation of the leg became necessary." * * *

*Miner riding in car colliding with prop that supported roof of mine—
Master not liable.*

In *GOLDEN v. MT. JESSUP COAL CO. LIMITED*, (Pennsylvania, June, 1909) 73 Atl. 1103, judgment for defendant in the Court of Common Pleas, Lackawanna county, was *affirmed*, the case being stated in the opinion by STEWART, J., as follows:

"This case differs from *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 33 Atl. 237, in minor and immaterial circumstances only. The controlling feature in the case is that the plaintiff's injury resulted from the car on which he was riding, while engaged in work, coming in contact with a prop which had been erected to support the roof of the mine. This prop had been put in place some two or three weeks before the accident by a mine foreman, who was duly certified as such under the law. The evidence shows that the body of the cars ordinarily used extended beyond the track at either side some twelve or fourteen inches, while the distance of the prop from the nearest rail was at most not more than eighteen inches. This evidence might well warrant the inference of negligence in maintaining the prop where it allowed a clearance of no more than three or four inches

"Here we have the proximate cause of the accident; but where did the responsibility rest? The accident occurred before the passage of the Employer's Liability Act of June 10, 1907 (P. L. 523). In *Durkin v. Coal Co.*, 171 Pa. St. 193, 33 Atl. 237, a case which has never been questioned, but has repeatedly been recognized as sound in principle, it was held that, inasmuch as by the Act of June 2, 1891 (P. L. 176), the State requires the employment by the operator of mines of a certified foreman, and invests such foreman with the power to compel compliance with his directions, so far as they relate to the safety of the employees in the mine, an employer cannot be held liable for the mistakes or incompetency of the State's representative. And, further, it is there held, following the doctrine of the earlier cases, notably *Waddell v. Simoson*, 112 Pa. St. 567, 4 Atl. 725, that a mine foreman is a fellow-servant with the other mine employees of the same master engaged in a common business and that the employer is not liable for injuries caused by the negligence of the foreman. These principles apply here.

"There was evidence in the case that the car on which plaintiff was riding was an old car, and swayed somewhat from side to side, and it is argued that but for this circumstance the accident would not have happened. But it nowhere appears that the car was defective in any of its parts, that it was any different from those generally employed, or that it was in any way unfit or insecure for the ordinary use to which it was put. However the fact that it swayed may have contributed to the accident, it was not the proximate cause. That is to be found in the placing of the prop so close to the track as not to allow sufficient clearance for cars ordinarily employed. A common-law duty rests upon the employer to provide a safe place for his employees in which to work; but if he has provided a safe place, which has been made unsafe by the act of the mine foreman, whose authority may not be questioned, and whose direction must be complied with under penalty, he has met the full measure of his duty, and he is not to be charged with civil responsibility for a condition which he did not bring about, and which he could not control. The case called for judgment *non obstante*, and the judgment is affirmed."

Texas.

Boy killed by derailment of coal car in mine — Master liable.

In *TEXAS & PACIFIC COAL CO. v. KOWSIKOWSKI*, (*Texas Civil Appeals*, February, 1909) 118 S. W. 829, judgment for plaintiff for \$600 in the District Court, Palo Pinto county, in action for death of plaintiff's son, sixteen years of age, injured by derailment of coal cars in defendant's mine, was *affirmed*. Evidence reviewed and held sufficient to sustain verdict and judgment. Opinion by CONNER, CH. J. *Rehearing denied*, March, 1909.

Miner killed by falling into mine shaft — Assumption of risk.

In *MT. MARION COAL MINING CO. v. HOLT ET AL.*, (*Texas Civil Appeals*, March, 1909) 118 S. W. 825, judgment for plaintiffs for \$4,500 in the District Court, Palo Pinto county, in action for death of plaintiffs' intestate caused by falling into defendant's mine shaft, was *reversed*, on the ground of assumption of risk. CONNER, CH. J., set out the evidence as follows:

"The shaft of defendant's mine was divided into two compartments by

a heavy wooden partition; each being about six by eight feet in size. There were two landings above the surface, one at the ground and one above, called the tippie; the latter being fifteen or eighteen feet above the former. At the top landing or tippie, the coal, slate, etc., were dumped, and at the ground or lower landing the water was dumped. The mouth of the shaft at the ground landing was fenced on three sides; the side where the water cars were taken off being open, and the fence being of pickets one by four in size and about four feet high. There were large pillars around the mouth of the shaft supporting the tippie, etc., above; also guides at the sides of the shaft holding the cage in position. The cages were four feet, ten inches, by six feet, one inch, and consisted of a floor and top, the latter made of a solid sheet of iron, the floor and top being connected by iron rods at the four corners of the cage. And the roof is a little smaller than the floor, is flat, and is about six and a half feet from the floor. Witnesses Poole and Warren estimated that the roof was seven or eight feet above the floor. There was nothing visible about the cage when standing at the landing except the floor and the top, or bonnet. At the ground landing there was a flat sheet, made of iron, some twelve by fifteen feet or more in dimensions, on which was a track corresponding to the track on the cage. According to the witness Warren, the box of the water car was about six feet long and three feet deep, and the cars about three and a half or four feet high, were built of two-inch stuff and were heavy, especially when wet and soggy. Witness Brookline testified that the trucks of the cars were twelve inches in diameter, and that the cars were twenty-two inches deep, making a total height of twenty-eight inches. Witness Poole testified that he had made some of the cars, and that they were about five feet long and twenty-four or twenty-five inches deep and about three feet from the ground, and weighed 400 or 500 pounds. Witness Warren testified that it was his understanding that the boss had assigned to Holt the duty of emptying the water cars on the day he was killed. It was some time in the afternoon when he fell into the shaft. He had no regular line of duty, but did whatever was assigned to him to do. Brookline testified that Holt's duties at the time of his death were to take off the water and slate cars and dump them. The slate cars were dumped at the upper landing or tippie. Witness Geyer testified that he was the father-in-law of Holt, that Holt had been at work at appellant's mine more than a year, and that he had never seen him pulling off water cars at any time during that period.

"At the time Holt was killed, there were no bars or gates guarding the entrance to the mouth of the shaft. Witness Poole testified, among other things, as follows: 'Some two or three months before Holt was killed, I had a conversation with Mr. Whittsell, the superintendent, about the matter of putting up some protection there. We were working seven days in the week then, and I asked him one Sunday morning if he could not provide some way to get gates there at the opening where the cars were handled, for the protection of the people who worked about the mouth of the shaft. He told me that after we got to the coal he would fix it so that nothing would fall in. We were then within eight or ten feet of the coal. At the time of Holt's death, if there was any protection

or gate there to keep anything from going into the shaft, I don't know it. There was a protection put up there after Holt fell in. I do not remember how long after Holt's death, but it was only a few days.' Witness Geyer testified that between Monday and Friday following Holt's death a bar was placed at the entrance of the shaft. Witness Walter Warren, weighing clerk for appellant at the time, testified that there were bars at the entrance of the shaft to prevent the cars from running back into the shaft when the cage was not in position, but did not know whether they were there the day Holt was killed or not, and that when the bar was in position nothing could go into the shaft, a car nor anything else. Witness Brookline, mine foreman of appellant at the time, testified, in substance, to the same facts; also, that the men had orders to close the gate every time they pull a car off the cage, even if the car is off only for a moment. Following the death of Holt, marks were found on the flat sheet where the accident occurred that appeared to have been made by Holt trying to hold back the car which was precipitated into the shaft. Witness Poole testified that they commenced about four and a half feet from the shaft and ended about three feet from it. Holt wore heavy miner's shoes with heavy roundheaded tacks in them. James Holt testified that he examined the landing, etc., about three hours after Holt's death, and that the surface was slick and wet, and looked slippery. In returning the water car to the cage, Holt, or any one doing that work, would push the car, and would be more or less in a stooping position, and in pushing the car back to the shaft it would be between him and the opening. Witness Poole further testified as follows: 'It would be owing to what kind of a start a man gave the car, as to how much force it would take to stop it in returning to the cage. If he pushed it fast, he would have to hang on to it pretty hard to stop it. It has considerable weight and would be hard to hold. I am not sure about the track of this water car, but I think it was on a level all the way from the landing to the dumping place. I have sometimes used considerable effort to stop the car.' Further, that he had handled the water cars himself when not doing other work, and that at the time of the trial the company was not using the cars, but was using pumps instead."

Rehearing denied, April 17, 1909.

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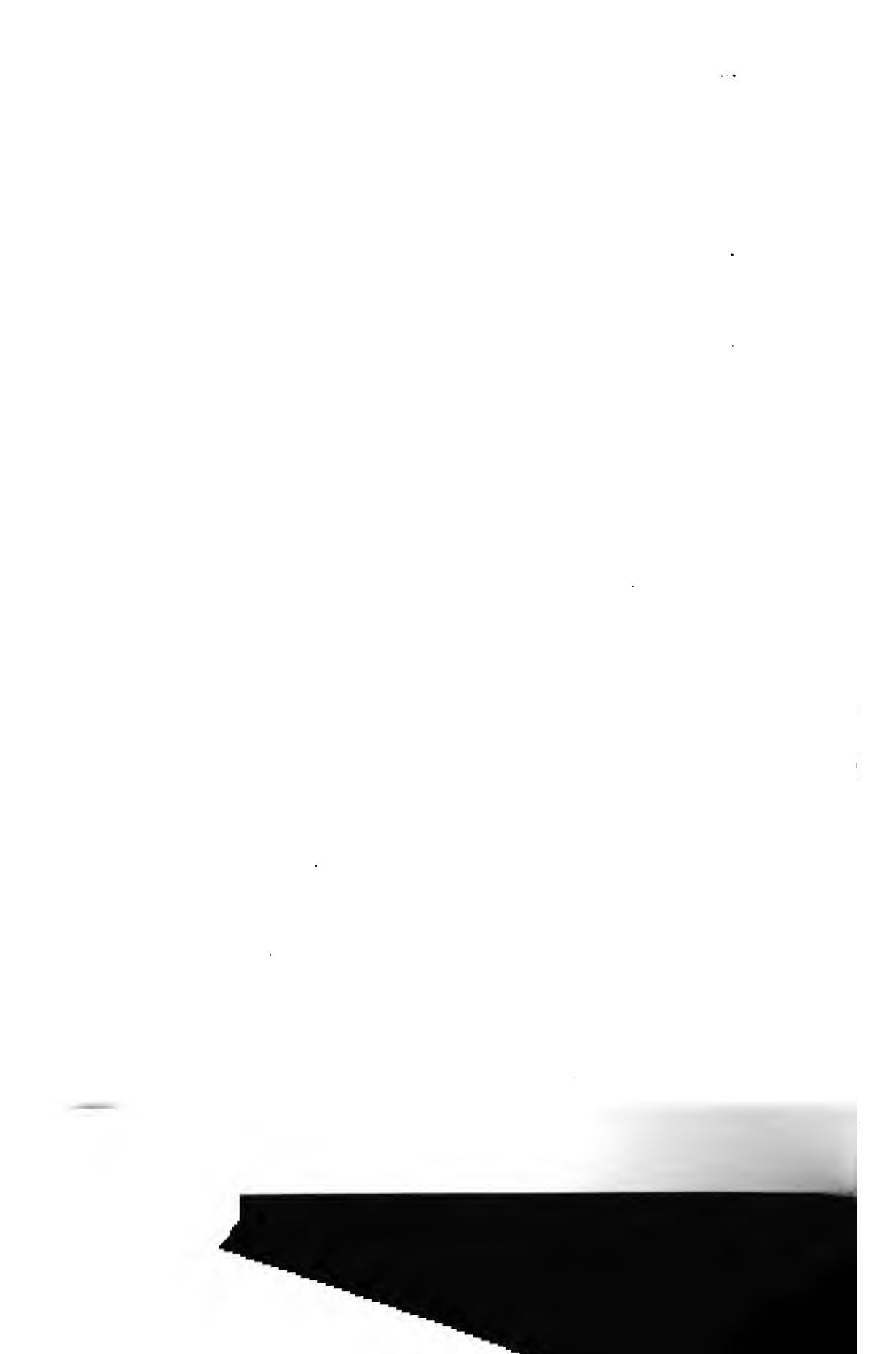
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By.

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[See also the

Accident Policy.

in an action on a policy
dent insurance, eviden
insured was found b
bottom of a wall, ba
jured, near unrailed
which he was reclinin
bench only shortly
alone, and in the dark
night, made a *prima fac*
of injury by violent, ex
and accidental means...

in such case, unless inj
shown to have been inte
ally self-inflicted or inte
ally inflicted by some
person, the legal presu
is that it was accidenta

V

where an accident policy i
ditioned against liabilit
injury happening whil
sured is intoxicated, and
plea in that behalf is
successfully relied upon
evidence must show tha
sured was actually intoxi
at time of accident....W

evidence as to appearance
intoxication, or their abs
by witnesses who saw in
immediately before or
injury, is proper and
missible in that behalf..

W.

in an accident policy, excep
liability for injury to ins
while on the roadbed
bridge of a railway, the m
fest intention is to exempt
insurer from responsibility
injury caused by collision w
moving trains thereon..W



Action — cont'd.

mediate death, which includes cases both of instantaneous death and of total unconsciousness, following immediately upon accident and continuing until death, and duration of that period of unconsciousness is immaterial. Me. 116

where plaintiff's intestate, an engineer in defendant's mill, while passing under a rapidly moving belt, was struck on the head by the hooks and knocked unconscious, remaining so until his death seventy-five hours later, action was properly brought under Rev. St. 1903, c. 89, sec. 9, providing for recovery for death, although intestate survived several hours. Me. 116

where plaintiff, an employee of defendant railroad company, was engaged with other employees in constructing a wire fence, and a staple was being pulled out by other employees and it flew into the air and struck plaintiff in the eye, a cause of action was sufficiently stated under the statute, Laws 1907, c. 254, p. 495, which imposes liability upon railroad companies for injuries to railroad employees caused by negligence of fellow-servants (except employees working in shops and offices) and demurrer was properly overruled. Wis. 394

a judgment in an action in a State court for personal injuries granting a new trial on ground that defendant was not negligent, plaintiff voluntarily discontinuing the action, did not bar right action in a second suit in a Federal court on same cause of action. U. S. C. C. A., N. J. 311

Action — cont'd.

damages sustained by injuries to persons as well as to property are recoverable against a city for a breach of its duties to keep its bridges or streets reasonably safe for travelers. U. S. C. C. A., Minn. 445

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Iowa, 646

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Iowa, 646

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U. S. C. C. A., Minn. 445

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- should have been, known to him, he was negligent as there was no necessity for passing under belt at point of accident Me. 116
- it is well-settled law that a general knowledge of danger, without an appreciation of it, is not conclusive upon question of assumption of risk. Me. 132
- there can be no recovery against an employer for an injury to an employee which he would not have sustained if he had not voluntarily and unnecessarily used an appliance other than that for which he knew it to be intended. Ohio, 251
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- where a steam radiator exploded in one of the rooms of a building sublet to plaintiff's employer, and plaintiff was injured, burden was upon plaintiff to show that accident was caused by defendant's negligence Cal. 29
- where employee of tenant was injured by explosion of steam radiator, negligent construction, etc., being alleged, but it

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a common carrier cannot contract for exemption from liability growing out of its own negligence or that of its servants Ark. 484

where a contract of shipment specifically provided that, before a recovery could be had, notice in writing must be given of loss or damage within thirty hours after arrival of goods at destination and

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where a railroad company, under an agreement, constructed a spur track adjoining plaintiff's planing mill, and plaintiff agreed to release company from all liability for fire communicated by locomotives operating on said track, company was not relieved from liability for loss by fire caused by sparks from locomotive on its main track not engaged in work connected with the spur track La. 103

where plaintiff's mill and appliances were destroyed by fire caused by sparks from one of defendant's locomotives then on the main line, the burden was on defendant to show that such locomotive was then engaged in work connected with use of spur track adjoining plaintiff's planing mill, in order to avoid liability under agreement between the parties relating to spur track La. 103

where plaintiff accepted a low rate for carriage of goods, a case of furs, releasing value to one dollar per pound, real value being stated by plaintiff at \$3,000, and on arrival at destination it was found that furs to claimed value of \$1,920 had been abstracted and other matter substituted, and plain-

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where plaintiff's intestate, an engineer in defendant's mill, while passing under a rapidly moving belt, was struck on the head by the hooks and knocked unconscious, remaining so until his death seventy-five hours later, action was properly brought under Rev. St. 1903, c. 89, sec. 9, providing for recovery for death, although intestate survived several hours Me. 116

where plaintiff's intestate, an engineer in defendant's mill, while passing under a rapidly moving belt from which the nuts and bolts projected, was struck on head and knocked unconscious, danger being, or should have been, known to him, he was negligent as there was no necessity for passing under belt at point of accident. Me. 116

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- master not legally obliged to have set screws upon machine so countersunk or otherwise fixed as to remove all danger from them, provided they are plainly visible to an observing operative. Me. 137
- servant undertaking to operate a particular machine, without stipulation to contrary, assumes risk of injury, not only from those features called to his attention but also those open to observation. . . . Me. 137
- it is duty of operator of machine to acquaint himself with at least all visible features of machine before operating it. . Me. 137
- an operative's ignorance of set screws in a machine does not relieve him of risk of danger from them where they are plainly visible and easily seen. Me. 137
- a female operative of mature years having operated a machine for nineteen years during which time she had cleaned same about the set screws, which projected from certain parts of it, at least twice a week, was chargeable with knowledge of danger from set screws and assumed risk of injury from her hair becoming entangled in them. Me. 137
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Wis. 430

duty which law imposes in favor of user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to customers directly, is identical with duty imposed by law on all persons with respect to the public generally, and there is no privity nor particular relation carrying with it special duties or a special degree of care in such case. Wis. 430

a manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence, if such injury to others might have been reasonably foreseen in the exercise of ordinary care. Wis. 430

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the Act of Congress April 22, 1908, c. 149 (35 U. S. Stat. 65) making every railroad while engaged in interstate commerce liable for injuries to employees while employed in such commerce fully discussed in its application to the common and statutory law of the several States governing master and servant cases in the issues presented by an inhabitant of Connecticut against a railroad company organized under the laws of Connecticut, for an injury received by him while acting as a train hand and engaged in coupling cars on the company's road in Massachusetts, due to the negligence of a fellow servant in control of another train belonging to same company. . . .

Conn. 42

coal mine owner bound to exercise reasonable care commensurate with known danger of instrumentality employed and seriousness of consequences liable to follow omission of such care toward employees. Iowa, 646

whether it was negligence to store powder and dynamite in dangerous quantities in a coal mine in the only room provided for use of workman for refuge from storm and for keeping their tools, clothing, and lunches, and whether mine owner exercised full duty to protect workman from danger, were questions of fact for jury. Iowa, 646

where a workman in defendant's mine was killed by an explosion of powder and dynamite.

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mite that was stored in a room used by workmen, and it appeared that at time of explosion a violent electrical storm was in progress, which storm defendant alleged was cause of accident, jury were justified in finding from the evidence that deceased was killed by explosion, and not by a lightning stroke....Iowa, 646

if defendant was negligent in depositing powder and dynamite in a place in a mine where their accidental ignition would necessarily endanger the lives of its servants, such negligence would be the proximate cause of resulting injury, notwithstanding source of the spark which exploded them was purely accidental or wholly unknown.....Iowa, 646

if there be lack of reasonable care on the part of master in storing explosives too near servant's place of work, such negligence is not purged by exercise of care in other respects.Iowa, 646

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assumption of risk is for jury, unless opposing view is one upon which reasonable minds are not likely to differ..Iowa, 646

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master not legally obliged to have set screws upon machine so countersunk or otherwise fixed as to remove all danger from them, provided they are plainly visible to an observing operative. Me. 137

servant undertaking to operate a particular machine, without stipulation to contrary, assumes risk of injury, not only from those features called to his attention but also those open to observation. Me. 137

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a female operative of mature years having operated a machine for nineteen years during which time she had cleaned same about the set screws, which projected from certain parts of it, at least twice a week, was chargeable with knowledge of danger from set screws and assumed risk of injury from her hair becoming entangled in them.

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in action for injuries to employee in defendant's coal mine, caused by negligence of alleged incompetent engineer whereby the cage was suddenly elevated throwing the men out of it, incompetency and intemperance of engineer being negligence charged, which facts were known to defendant, evidence as to such habits of engineer and defendant's knowledge thereof, was admissible as bearing upon competency of engineer to operate machinery, and it was error to exclude such evidence. Mich. 159

where the Michigan Mining Act, (Pub. Acts, 1905, No. 100, p. 143, sec. 3) providing that only competent engineers shall be permitted to operate the cages and hoisting devices in coal mines, has been violated, and an employee injured by act of incompetent engineer, the defense of assumption of risk or negligence of fellow-servant cannot be asserted. Mich. 159

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where the Michigan Mining Act, (Pub. Acts, 1905, No. 100, p. 143, sec. 3) providing that only competent engineers shall be permitted to operate cages and hoisting devices in coal mines, has been violated, and an employee injured by act of incompetent engineer, the defense of assumption of risk or negligence of fellow-servant cannot be asserted.Mich. 159

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where members of a charivari party forcibly place a bride and groom in a wagon against their will and draw them up and down the streets, they are engaged in an act of unlawful violence within meaning of definition that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," and fact that members of such party were good natured and intended no serious harm to anyone did not absolve the city in which such act took place from liability to a boy

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who was run over by wagon.

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city liable for injury to one person and death of another caused by horses becoming frightened by blast of a steam whistle while they were being driven over bridge, the whistle used being part of city's fire-alarm system but used by city's waterworks as a 'time whistle' for employees.

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a whistle maintained by a city on its waterworks and connected with city's fire-alarm system, but which was also blown as a "time whistle" for employees, was not blown in exercise of city's power to protect itself and its inhabitants from fire, but in exercise of its power to maintain waterworks and to care for its own property. U. S. C. C. A., Minn. 445

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Mich. 159

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where petition alleged that plaintiff's injuries were permanent and that his ability to labor had been reduced about one-half, after plaintiff had testified as to injury, his previous capacity to labor and his subsequent incapacity, it was not error to allow him to state that he could not do more than half as much labor in his vocation as a blacksmith since the injury as he could before it occurred Ga. 597

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killed by explosion,
by a lightning stroke
when negligence of a
able person concurs
flood or storm or
called "act of God"
ducing an injury, the
guilty of such negligence
liable for the injurious
sequences, if the injury
not have happened but
failure to exercise care
if defendant was negligent
depositing powder and
namite in a place in
where their accidental
would necessarily end
the lives of its servants
negligence would be
proximate cause of resulting
injury, notwithstanding
source of the spark
exploded them was purely
cidental or wholly un-

proximate cause of an injury
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where owner of building leased same to another person, latter retaining possession and control, who sublet the rooms for office and business purposes to various persons, and an employee of one of the subtenants was injured by explosion of a steam radiator, owner of building was not liable therefor.....Cal. 29

where a steam radiator exploded in one of the rooms of a building sublet to plaintiff's employer, and plaintiff was injured, burden was upon plaintiff to show that accident was caused by defendant's negligenceCal. 29

where employee of tenant was injured by explosion of steam radiator, negligent construction, etc., being alleged, but it appeared that radiator was not under exclusive manage-

Steam Radiator — cont'd.

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Stop, Look and Listen.

a person about to cross a railroad track, where line of vision is unobstructed, is bound to look for approaching cars, and if he does not look, and for that reason fails to see a car until too late to avoid collision, his negligence precludes recoveryDel. 57

a traveler at a street crossing is not under a hard and fast rule to stop, or to look and listen for street cars before crossing track, but is required to exercise due care, such care not amounting to that caution required before crossing track of an ordinary railway. Minn. 172

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judgment for \$700, for injuries sustained by a child, three years old, whose right hand and arm were caught in a moving stairway or escalador in defendant's store, affirmed. Mo. 235

where plaintiff, an employee in defendant's store, injured by falling into elevator well, alleged negligence of defendant in permitting elevator boy to temporarily leave elevator as he had been accustomed to do to perform other duties in the building, it was held that defendant was not negligent in that respect, nor was he bound as against an employer

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where a flag pole erected in front of premises used by an association, which was used for flag raising by members of the community, was blown down by an unusual wind storm and a person was killed thereby, no liability attached to the members of the association, there being no negligence on their part....Idaho, 85

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Street Car.

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a street car and a footman or vehicle have equal rights of the same kind to the concurrent use of the city streets..

Minn. 172

at a street crossing, or place used as a crossing, a motorman in charge of a street car is bound to keep a sharp lookout for passengers or others who may attempt to cross the tracks behind another car, and to have his car under such control that he can stop upon appearance of danger, and to give usual signals to protect travelers who are in exercise of ordinary care.....Minn. 172

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Street Railroad Company.

if a person moves from a position of safety to one of danger, near or upon tracks upon which a street car is running, so suddenly as to make it impossible to stop car before collision, railroad company cannot be held liable for resultant injury Del. 57

when a motorman of a street car sees a person in a position of danger upon the track it is his duty to do everything that a reasonably prudent person under like circumstances would do to avoid accident, and for injury resulting from failure in this respect he is guilty of negligence. . . . Del. 57

degree of care required of street car company is differentiated from that of an ordinary user of the street, because its tracks make the side movements of its cars impossible, and because it is authorized to operate heavy cars, with powerful motive force, by reason of which the momentum and inertia of its cars differ from that of ordinary vehicles. . . .

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Street Railroad Company — cont'd.

a street car company does not acquire by its conferred franchise, a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. Minn. 172

Streets. See also HIGHWAY. where driver of wagon collided with fire hydrant in street and it appeared he was driving at rapid rate, that he knew condition of street, and could plainly see in front of him but he turned his horse out of the beaten way and ran into the hydrant concealed by weeds, etc., his own want of care precluded recovery, regardless of whether city was or was not negligent Col. 36

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a street car company does not acquire by its conferred franchise a servitude or right to priority of way upon the highway, as does an ordinary freight or passenger railway company, by gift, voluntary transfer for consideration, or condemnation with compensation, as to land over which it runs its tracks. Minn. 172

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where wrong complained in negligent delay in delivery of sick message sent from a point in Georgia occurred solely in Alabama, plaintiff was entitled in action *ex contractu* in Alabama to recover for mental anguish under law of Alabama although such damages are not recoverable in Georgia.

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Ala. I

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if a person moves from a position of safety to one of danger, near or upon tracks upon which a street car is running, so suddenly as to make it impossible to stop car before collision, railroad company cannot be held liable for resultant injuryDel. 57

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where a person sitting on railroad track was struck by train, judgment for plaintiff was reversed, the case turning solely upon the question whether the injuries were inflicted wilfully and wantonly, and that issue should have been presented to the jury unconfused with other issues Ga.

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Minn. 172

Vendor.

duty which law imposes in favor of user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with duty imposed by law on all persons with respect to the public generally, and there is no privity nor particular relation carrying with it special duties or a special degree of care in such caseWis. 430

a manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence, if such injury to others might have been reasonably foreseen in the exercise of ordinary careWis. 430

Vendor — cont'd.

neither manufacturer nor vendor liable to purchaser of a cake of soap who was injured by a needle imbedded in the soap, manufacturer not being liable for such an extraordinary occurrence, accident being a remote possibility, and seller not being liable as he had no knowledge of presence of needle and could not by ordinary care have discovered it.

Wis. 430

liability of manufacturer and dealer for injuries to third persons caused by use of dangerous article or commodity; notes of cases in Connecticut, U. S. Supreme Court, New York, Michigan, Massachusetts and Ohio.....430-438

Verdict. See also DAMAGES.

fact that jurors agreed to render a quotient verdict and afterwards declined to do so, and in fact did not so arrive at their verdict, did not make verdict a quotient one, and was no reason for setting verdict asideAla. 1

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Vessel.

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"Voluntary Exposure." See WORDS AND PHRASES.

Water Company.

a waterworks company, having a contract with a city to extinguish fires and to furnish consumers with water for domestic and other purposes, is under no public duty to a resident of city to furnish city with water to protect his property from loss by fire, and consequently cannot be held liable to him, in action for tort, for loss sustained by him by reason of failure to supply water to extinguish fire that consumed his propertyGa. 70

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Waters and Watercourses.

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by overflow of surface water, due to alleged neglect of defendant to keep open the waterways or culverts under its railroad, it was held that statute of limitations commenced to run from time of injury and not from time of construction of said waterways, and judgment for plaintiff affirmedAla. 477

liability of landowners for injuries to property caused by overflow of surface water, etc.; notes of cases in Colorado, Kentucky, Missouri and Texas479-484

Whistle

city liable for injuries to one person and death of another caused by horses becoming frightened by blast of a steam whistle while they were being driven over bridge, the whistle used being part of city's fire-alarm system but used by city's waterworks as a "time whistle" for employees..U. S. C. C. A., Minn. 445

a whistle maintained by a city on its waterworks and connected with city's fire-alarm system, but which was also blown as a "time whistle" for employees, was not blown in exercise of city's power to protect itself and its inhabitants from fire, but in exercise of its power to maintain waterworks and to care for its own property.U. S. C. C. A., Minn. 445

in an action for damages caused by frightening horses on a highway by blast of a whistle, evidence that tractable and gentle horses had been frightened previously by blasts of same whistle under similar

Whistle — cont'd.

circumstances was competent.

U. S. C. C. A., Minn. 445

where blast of whistle frightened horses on a bridge and they ran, the tugs came unhooked, the tongue slipped from the yoke, fell to the bridge and broke, the wagon crashed against the railing, threw the occupants over it to the ground and injured them, the proximate cause was the blast of whistles, and subsequent events preceding injuries were dependent upon and caused by it.....

U. S. C. C. A., Minn. 445

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Words and Phrases.

a "telegraph" is an apparatus or machine used to transmit intelligence to a distant point by means of electricity...Ala. 1

a "telegram" is a message or dispatch transmitted by the telegraphAla. 1

an instruction upon the burden of proof in which the words "preponderance, or a material part, of the evidence" were used was erroneous, the words "or a material part" not being synonymous with the word "preponderance," as a "material part" might or might not be a "preponderance" of the evidence, but as there was no conflict as to the salient facts of liability the error was not prejudicial.

Ark. 22, 27

where plaintiff alleged that he was standing at usual place for defendant's streets cars to take on passengers and as car approached he signaled motor-

Words and Phrases — cont'd.

man to stop whereupon car slowed up until it had come very nearly to a standstill and that plaintiff was in full view of motorman when he so signaled, the complaint sufficiently alleged that motorman saw and understood signal, the meaning of word "signal" being to communicate by means of an understood "sign".Cal. 566

an instruction on the "preponderance or greater weight of the evidence," without explaining the terms, was a correct statement of law, and it could not be assumed that jury did not understand it or that they inferred that the terms meant the number of witnessesDel. 57, 62

where members of a charivari party forcibly place a bride and groom in a wagon against their will and draw them up and down the streets, they are engaged in an act of unlawful violence within meaning of definition that "a mob is an unorganized assemblage of many persons intent on unlawful violence, either to persons or property," and fact that members of such party were good natured and intended no serious harm to any one did not absolve the city in which such act took place from liability to a boy who was run over by the wagon..

Kan. 99

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sitting or lying on a bench at side of building near top of unguarded wall, on a dark night, it not appearing that in-

Words and Phrases — cont'd.

sured in so doing was conscious of the pitfall, or had knowledge of his surroundings, is not within the meaning of the terms "voluntary exposure to unnecessary danger" in an accident policy...

W. Va. 371
notes of "accident policy" cases in Maryland, Massachusetts, New Hampshire, West Virginia, Wisconsin and U. S. C. C., E. D., Pa., in

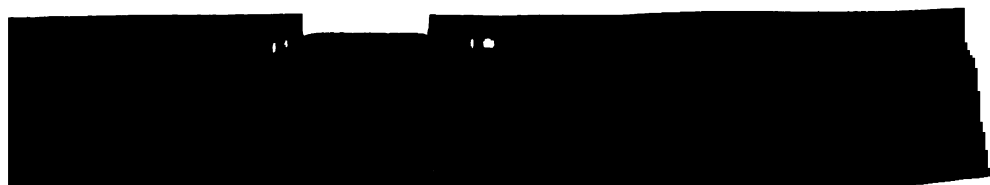
Words and Phrases — cont'd.

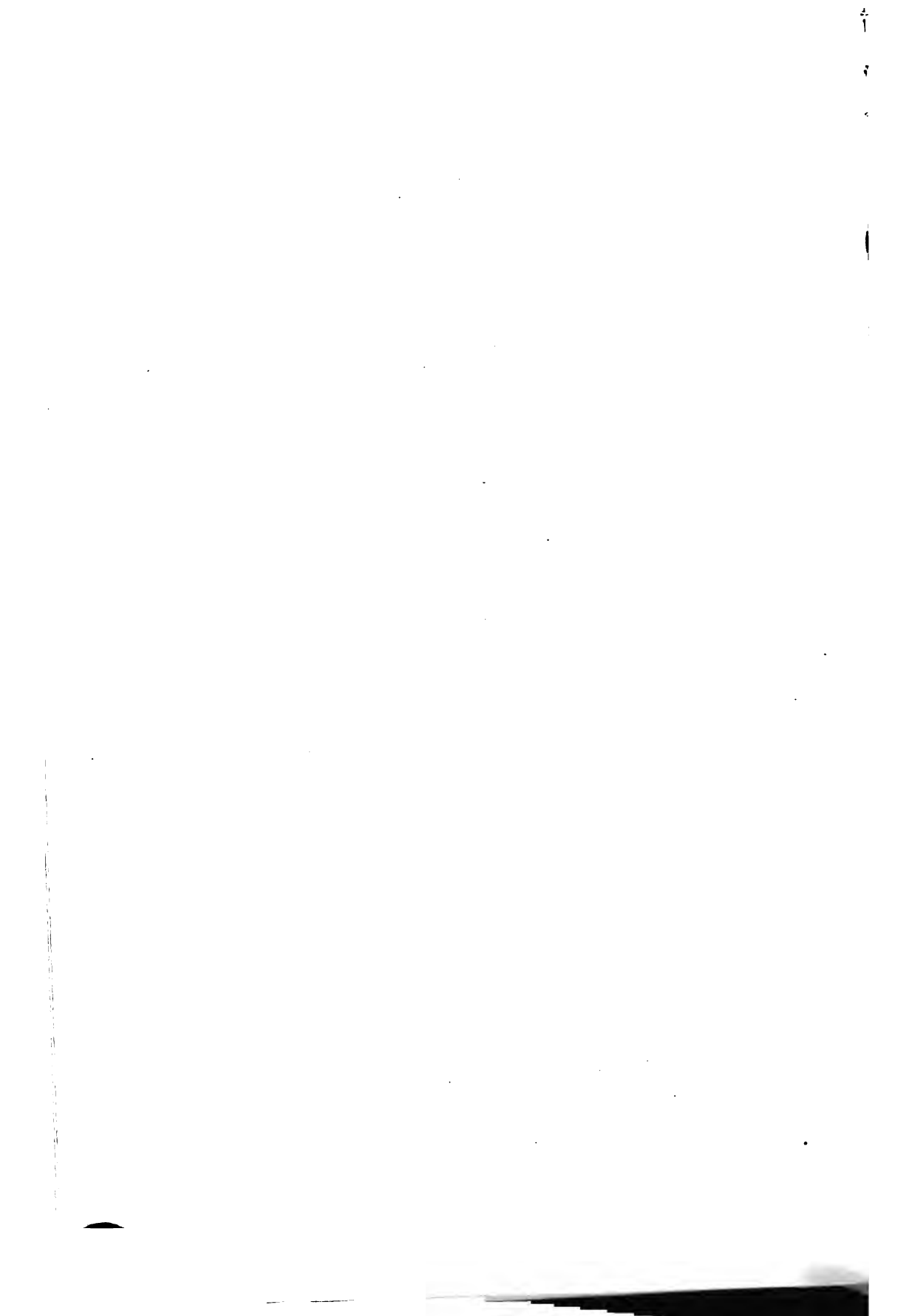
which the phrase "voluntary exposure to danger" is fully discussed 382-394

X-ray Treatment.

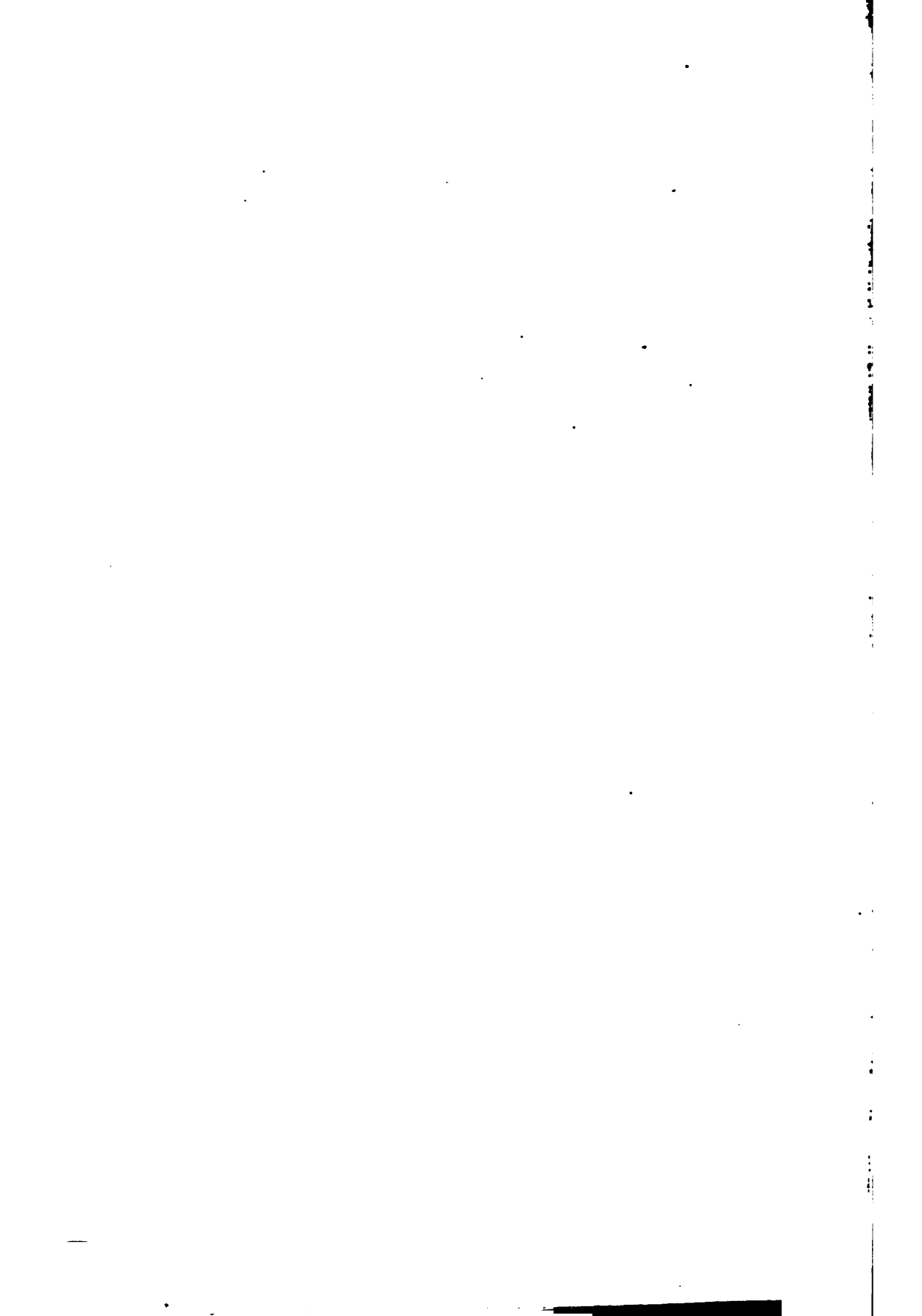
judgment for \$3,500, for malpractice in X-ray treatment, reversed, for errors in giving and refusing certain instructions to the jury upon degree of care required of physician.

Mo. 336









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